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Federal Judicial Salaries

THE Board of Directors of the National Manufacturers Association at a meeting held early in the present month passed resolutions in favor of legislation at the coming session of Congress to afford adequate salaries to the Federal Judiciary. In the bulletin of the Association announcing this action there are some observations and, in particular, some figures regarding the relative increase in the salaries of the Federal judiciary and other classes that are very pertinent. "Through the greatly increased cost of living," the bulletin states, "the Federal judges have been put in a difficult position. Since 1891 their salaries have been raised only 50 per cent, while the general purchasing power of the dollar is only about 27 per cent of what it was then. In that time the wages of the farm hand have been increased 500 per cent, stenographer 350 per cent, school teacher 250 per cent, housemaid 450 per cent, bricklayer 450 per cent. In 1891 a United States District Judge received about seven times the annual wage of a bricklayer, while at present he receives less than twice as much. The salaries of the federal judges are so low that, in the larger cities at least, these judges not only cannot live in keeping with the dignity of their office, but can only live on their salaries at all by the closest economy.

"They cannot send their children to college. Many of them are compelled to eke out their salaries by resort to savings which had been accumulated for their old age. A considerable number of the judges have resigned to take up practices which pay them many times their judicial salaries. Many other judges are restive. Most of them took their appointments intending to make a life career of the bench, but many say they cannot continue unless the salaries are increased.

"The National Association of Manufacturers believes it is vital to remedy this situation. Replacing the judges who were appointed when the salaries had sufficient purchasing power by others at the present very inadequate salaries will result in a lowering of the average ability of the judges, for competent men cannot take the positions for the honor alone, much as they might otherwise be attracted. Frequent changes in judges also impairs their efficiency, for it requires long experience on the federal bench with its widely varied work, to bring a judge to his best. Unwise legal decisions are immeasurably more costly than adequate salaries."

A Complicated Power of Attorney

A BULLETIN of the Division of Commercial Laws, of the Bureau of Foreign and Domestic Commerce at Washington, points out what a complicated and ticklish thing is a power of attorney from an American firm to a Cuban lawyer in the little republic protected by the Platt Amendment. "Cuba's courts," it says, " are open to suitors of all nations and justice is guaranteed by the Cuban constitution. Nevertheless, the technical difficulties which stand in the way of the foreign concerns which have claims against Cuban nationals or others residing within the jurisdiction of Cuban courts make it highly impracticable to look to the courts for relief. At the outset of any action at law a foreign firm is faced with the necessity of retaining a member of the Cuban bar armed with a power of attorney to sue on behalf of the foreign plaintiff. This in itself is not an unreasonable re-

quirement, were it not for the fact that the acceptance of the interpretation of the laws relating to powers of attorney makes it almost impossible for a foreign corporation to draft a power of attorney which will meet all the requirements.

"The power of attorney of an American corporation, the sole object of which is to authorize a Cuban lawyer to represent the corporation in an action at law, must contain among other things, certified copies of the articles of incorporation, certified excerpts from the corporation law under which the company was organized, transcripts of the minutes of the corporation, showing the election of the board of directors and the officers, copies of the special resolutions of the board of directors authorizing the appointment and numerous other details. It is obvious that so technical a document is subject to attack from many angles and it does not take a very shrewd opponent to find difficulties with powers which are drafted in foreign countries in accordance with Cuban practices."

New Federal Clerks' Fee Bill

ON July 1 the new fee bill for clerks of the U. S. District Courts became effective. The new act provides, we are informed in a communication from the officers of the Federal Court Clerks' Association, that upon the institution of any suit or proceeding whether by original process, removal, indictment, information or otherwise, there shall be paid by the party or parties instituting the suit or proceeding as fees of the Clerk the sum of $5. This fee covers the filing of the bill, petition, declaration or whatever the paper instituting the suit may be called, the issuance of process, the filing of all papers and the entering of all orders up to the time of the filing of an answer or paper joining issue, when another $5 fee is to be paid by the party or parties filing such paper. If there are other defendants filing separate answers the $5 fee is taxable to the defendant first filing an answer or paper joining issue and every other defendant, intervenor or cross petitioner filing such a paper is taxed the sum of $2. These fees cover all the ordinary intermediate services up to the entry of any judgment decree or final order, when another $5 fee is to be paid by the prevailing party. This fee covers the ordinary services of the case including the issuance of fieri facias, proceedings in aid of execution, issuance of injunction writs, etc., up to the time when a petition for appeal or writ of error is filed, when an additional $5 fee is charged and collected from the party or parties prosecuting such appeal or writ of error. If a cross-appeal or cross-writ of error is filed a $5 fee must be paid by the party or parties so filing it.

For each additional trial or final hearing upon a reversal by an appellate court, or following a disagreement of a jury, or the granting of a new trial or rehearing by the district court, $5 must be paid by the party securing such reversal, new trial or rehearing or from the plaintiff or plaintiffs if there has been a disagreement.

Extraordinary fees, or perhaps it is better to say, fees that are unusual to the ordinary case, and fees for services not in a case are chargeable under Section 8 of the fee bill. Such services, as (a) acknowledgments, certificates, fees for taking depositions, when taken before the Clerk, fees for final records, commission or poundage of 1% on moneys received and paid out by the Clerk in pursuance of any statute or order of court, fees for making and/or comparing of transcripts on error or appeal are included in extraordinary fees in cases for which a charge as provided by Section 8 is made in addition to the fixed fees; and (b) fees for issuing witness subpoenas or any writ, not in a case instituted or pending in the court from which it is issued; for filing and indexing any paper not in a case; for copies of papers, certificates as to judgments and pending suits, etc., come under the head of fees not in cases.

The fees in the first class (a) of the preceding paragraph are taxable in the costs in the case and are recoverable in accordance with the judgment or final decree of the court, while those in the second class, (b) in the absence of any rule or order of the court to the contrary, will be charged as miscellaneous fees not in a case.

Each defendant in a criminal case will be expected to pay the fee of $5 upon the entering of a plea of not guilty, unless they have been relieved from such payment by the filing and approval of an affidavit *in forma pauperis* as provided by the Act of June 27, 1922 (42 U. S. Stat. at Large 666).

The fees in bankruptcy cases are not affected by the new fee bill except as stated in Sec. 8, Pars. 7 and 10.

Nothing in the new fee bill interferes in any way with the power of the court to finally adjudge the costs as heretofore.

In some districts it is the practice to require deposits to secure costs from plaintiffs only and all costs are charged in the first instance to the plaintiff. In other districts a deposit is required from both plaintiff and defendant. Each court may determine for itself which practice it will follow. While there is nothing in the Act as to deposits to secure costs, Clerks will be required as heretofore to demand deposits under existing or new rules, since they are held responsible by the Government for all fees earned, whether collected or not, and must account therefor to the Attorney General quarterly. The Clerk must, therefore, have the deposits to draw on, or advance the money to the Government from his private funds.

Under the last proviso of Section 7 the court may, by rule or standing order, direct the collection in the first instance, of fees in cases, as fixed by the new fee bill, from either party so that in districts where the plaintiff only is required to make a deposit the court may direct all the fixed and other fees in cases to be charged to plaintiff, "but all such fees shall be taxed as costs" and of course follow the ultimate taxation of the costs in the case.

The Primer for Jurors

In printing the "Primer for Jurors" in the June issue of the JOURNAL we failed to give due credit to its author, Judge William B. Carswell of the New York Supreme Court. After Judge Carswell wrote the Primer it was adopted as the official instructions of the Board of Judges at the Trial Term of the Second Judicial District. This interesting and important innovation has, we understand, since been adopted for use in other departments of New York and in some other states of the Union.

WHERE THE JOURNAL IS ON SALE

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A CHANGE IN POLICY IN THE FEDERAL TRADE COMMISSION

Former Procedure as to Publicity of Charges—Changes Proposed in the Wadsworth-Williams Bill Introduced in January of Present Year—Many Essential Purposes of Bill Have Been Effected by Commission's Revision of Its Rules of Practice—Consideration of New Rules

By John Leland Mechem
Of the Battle Creek, Michigan, Bar

THE Federal Trade Commission, during its short existence, has earned many enemies. Friction and antagonism were natural results from the operation of so novel a type of governmental regulation. The condemnation of certain well-established commercial customs, even when used by old and honorable concerns, created hostility and suspicion among influential business interests. The Commission was but fallible, and some of its decisions were unjust, and some unwise. It neglected matters of great public concern, and spent public funds on cases of trifling importance. On the whole, however, it has made substantial progress, healed many ailments of the body politic, and done much to establish the "Code of American Business Law," which its sponsors declared to be its purpose.

Many of the criticisms related to the Commission's procedure, and particularly to publicity of charges. Until April 6th, last, the Commission, when it issued a formal complaint, always gave a statement to the press, containing the respondent's name, and a summary of the charges. The formal complaint files were always open to the public, but the Commission never gave any further publicity to the case until the final order. The practical result was that, immediately on the release of such a statement, it was circulated through trade circles, and often through the public generally, that So-and-So had been "indicted" by the Federal Government for unlawful business conduct. However, all that had been done, in fact, was to issue a complaint, charging violation of law on information and belief only. The answer filed might deny the facts or demur to the charge that they were unlawful, but it usually received no notice in the press. Many cases ran their course, and then were dismissed with some such comment as: "Dismissed without prejudice," "Dismissed, the Commission being now fully advised in the premises," or simply, "Dismissed," with no reason assigned. The net result was that the public knew that So-and-So had been proceeded against, and the case had died for unknown reasons; but the stigma against So-and-So did not die.

On January 20, 1925, the Wadsworth-Williams Bill (H. R. 11793), was introduced into the Senate by Senator Wadsworth, of New York, and into the House of Representatives by Mr. Williams, of Michigan. At the same time, the sponsors of the Bill united in a statement to the press that its purpose was to meet criticisms of the Commission and to provide for a constructive and helpful administration of the act under which it functioned.

To understand the changes proposed by the Bill it is necessary to recite briefly the procedure of the Commission (prior to the changes made in the Commission's rules, hereafter referred to).

The Act of September 26, 1914 ("An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes") provides a machinery for the investigation and prohibition by the Commission of unfair business practices. Section 5 of the Act provides that, whenever the Commission shall have reason to believe that any concern has been, or is, using any unfair method of competition in commerce, and if a proceeding in respect thereof would be in the public interest, it shall serve upon such concern a complaint, stating its charges, and containing a notice of a hearing at a day and place therein fixed. At this time and place the party complained of shall have the right to show cause why an order should not be entered requiring him to cease and desist from the violation of law charged. If, upon such hearing, the Commission believe the method of competition violates the Act, it shall make its findings as to the facts and issue its order to cease and desist from the method of competition in question.

The Commission has no means of enforcing its orders. If disobeyed, it may appeal to a United States Circuit Court of Appeals, which court shall thereupon have jurisdiction to affirm, modify, or set aside the order. If the order is affirmed, and still disobeyed, the respondent, presumably, can be punished for contempt of court. A respondent, dissatisfied with the order of the Commission, may also petition the Circuit Court of Appeals for modification or reversal of the order.

The Commission was advised of alleged violations of the Act, in over ninety per cent of the cases, by communications from injured competitors. All such communications were inquired into. If the preliminary inquiry showed no need for action, the matter was dismissed. If the inquiry showed a prima facie case, it was docketed as an application for complaint, and an Examiner detailed to investigate fully and report. The report consisted of a summary of the facts disclosed, the evidence submitted, and the Examiner's recommendation, either that complaint issue or the application be dismissed. If the latter, the Chief Examiner added his assent or dissent and forwarded the file directly to a Commissioner. (Cases assigned by rotation.) If the Examiner recommended a complaint, the Chief Examiner added his recommendation, and forwarded the file to the Board of Review—(a board

of three members, two lawyers and one economist). The Board considered the case carefully, briefed the facts and law applicable, and forwarded the file to a Commissioner, with a recommendation either that complaint issue, or that the application be dismissed. The Commissioner added his recommendation, and the case was then considered by the whole Commission, who voted to issue complaint, dismiss the application, or take such other action as might be appropriate. A majority vote controlled.

Up to this point nothing was made public by the Commission, and the files were not available to the public. The party complained of was advised of the proceedings, because the investigators had standing instructions to call upon him, advise him of the charges, and allow him to present whatever evidence he cared to file in his own defense. Neither the proposed respondent nor the applicant could do anything to influence the action taken. If the application was dismissed, no further action was taken. If the Commission issued a formal complaint, the case was made public when the complaint was served, and was accompanied by the statement to the press. The formal complaint, and the answer, record of testimony, exhibits, etc., thereafter filed, were public records. After formal complaint, it was the rule that a case could not be dismissed without a record—either by trial or by stipulation. It was the almost invariable rule that, after formal complaint, a case could not be dismissed because the respondent stopped the practice complained of.[1] The Commission preferred that the respondent stipulate the facts and consent to an order to cease and desist. The statute requires that findings as to the facts be made when an order to cease and desist is issued; but if the complaint was dismissed, no findings were made, and if any reason was assigned it was a brief sentence in the order.

The Wadsworth-Williams Bill provided the following changes:

Whenever the Commission shall have reason to believe that unfair methods of competition *are* being used, and that action in respect thereto would be to the public interest,

> it shall first and informally advise such person, partnership or corporation of its belief . . . and act constructively and helpfully to determine with the respondent the questions thus presented and to perform its duty without a formal proceeding.

The respondent is given three opportunities to discontinue the practice complained, and have the proceedings dismissed without publicity—when it is informally advised of the Commission's action, when the complaint is issued, and when the hearing is held; otherwise the Commission shall issue its findings and cease and desist order. At any time within 30 days after complaint is served, the respondent may move to dismiss, upon the ground that the method of competition used is not "unfair", within the Commission's jurisdiction. Appeal is allowed, from denial of this motion, to a United States Circuit Court of Appeals, which shall then have jurisdiction to review the question of law involved. The Bill further provides:

> The Commission shall not give public notice of the name of any respondent in any proceeding under either formal or informal hearings, unless such proceeding results in the issuance of a cease and desist order to said respondent.

The Wadsworth-Williams Bill was never brought to a vote, and, of course, died a natural death, at the end of the 68th Congress. However, it aroused a great deal of comment, both favorable and unfavorable. On February 19, 1925, a "Conference" was held in Washington, by interests friendly to the Bill, to which representatives of certain trade associations were invited. What may have transpired at this meeting is of no consequence here, except that afterwards certain representative trade associations quite frankly condemned the meeting and were outspoken in protest against the proposed law.[2]

Without entering into the merits of this controversy, it is sufficient to point out that many of the essential purposes of the Wadsworth-Williams Bill have been effected by the Commission itself, by a revision of its rules of practice.

To understand the changes, it is necessary to review briefly certain changes in the Commission itself. At the beginning of 1922 the Commission consisted of the following members: Messrs. Victor Murdock, Huston Thompson, John F. Nugent and Nelson B. Gaskill, all of whom had been appointed by President Wilson. On June 30, 1922, Commissioner Vernon W. Van Fleet was appointed by President Harding.

On February 7, 1923, on motion of Commissioner Gaskill the Commission passed unanimously, the Rule of that date, in substance as follows:

> When an application is made for complaint, the Chief Examiner shall make a brief investigation to indicate the facts, and then the Commission shall decide whether complaint shall issue, or the respondent be given an opportunity to desist voluntarily. If the former, the record to go back to the Chief Examiner for the usual disposition. If the latter, a letter should be written to the respondent, stating that the attention of the Commission has been called to the apparent use of unfair method of competition, briefly describing it. That if he prefers to admit the facts, assuming the charge to be true, and will abandon the use of the practice, and will state the facts and the abandonment in writing, with consent that in case of a resumption of the practice the Commission may issue complaint on the statement of facts and that it may be used in evidence against him on trial, then the Commission will accept the voluntary cessation of the practice as dispositive and will not issue a complaint; otherwise, the Commission will proceed to a trial of the issue upon a formal complaint.

On October 17, 1923, the Rule of February 7, 1923, was rescinded, on motion of Commissioner

1. The statute plainly contemplates this: "Whenever the Commission shall have reason to believe that any such person, partnership or corporation *has been* or is using any unfair method of competition in commerce, etc."

The Commission's right to refuse to dismiss, because the practice was discontinued, was affirmed by the Circuit Court of Appeals, (7th Circuit). *Sears, Roebuck & Co.*, vs. *Federal Trade Commission, 258 Fed. 307.*

2. I take the liberty of quoting from an editorial in the March, 1925, issue of "Drugs, Oils and Paints", the trade magazine of the Paint and Varnish Manufacturers Association:

"The Bill . . . proposes to remove the present Commission's imperfect, but fairly serviceable teeth, and provide it with a complete new set of shiny false teeth made of varnished sugar. It does not propose to abolish the Federal Trade Commission—nothing so rude or crude as that—but to give it blinders, suppress its bark, and forbid it to hunt by scent. It is still to be a watch dog, but a very gentle one, decorously chained and muzzled and guaranteed not to harm even a child. . . .

"Above all, good friends, no publicity! It might wound the tender sensibilities of the grafter, the false labeler, the fake manufacturer or the plain rascal!

"What we really need is broad general laws, penalizing fraud and bribery and similar unsocial evils, rather than a series of pretty regulatory measures singling out for persecution and annoyance individual industries—any business man will probably agree to that. Well, the law under which the Federal Trade Commission operates is such a law: It declares unfair methods of competition to be illegal, and empowers the Commmission to define and suppress such methods. But it gives no means of enforcing its decisions except the potent means of publicity. This one means is like a whip in the hands of an old time sheriff—it stings and brands without permanent injury. The opponents of the Commission wish to deprive it of its whip, and confine it to the use of the rebuke 'naughty, naughty' or a gentle slap on the wrist as means of punishment—WHY?"

Thompson, concurred in by Commissioners Murdock and Nugent; Commissioner Van Fleet dissenting. (Commissioner Gaskill apparently did not vote.)

On January 31, 1924, Commissioner Murdock resigned, and on June 16, 1924, President Coolidge appointed Charles W. Hunt to complete the term. On January 20, 1925, the Wadsworth-Williams Bill was introduced in Congress. Commissioner Gaskill's term expired September 26, 1924, and on March 3, 1925, the President appointed William Humphrey to fill the vacancy. The Commission then consisted of Messrs. Van Fleet, Hunt, Humphrey, Thompson and Nugent.

On March 11, 1925, by a majority vote of Commissioners Van Fleet, Hunt and Humphrey, the Commission adopted three rules, of which the following is the substance:

> Hereafter it shall be the policy of the Commission not to entertain proceedings where the alleged violation of law is a purely private controversy redressable in the courts, except where said practices substantially tend to suppress competition as affecting the public.
>
> All cases shall be settled by stipulation, except when the public interest demands otherwise.
>
> In all cases before the Board of Review, before it shall recommend that a complaint issue, it shall give the proposed respondent a hearing to show cause why a complaint should not issue. Said hearing shall be informal in its nature and not involve the taking of testimony. The proposed respondent shall be allowed to make or submit such statement of facts or law as it desires. The extent and control of such hearing shall rest with a majority of said Board. Three weeks notice of the time and place of such hearing shall be served on the respondent by the Secretary of the Commission.

The Board of Review was increased from three to five members at about this time. These changes were announced by the Commission on March 17, 1925, together with the statement that Commissioners Thompson and Nugent dissented, and would later give out a public statement.

On April 6, 1925, by the same majority, the Commission adopted the following rule:

> From and after this date, in the settlement of any matter by stipulation before complaint is issued, no statement in reference thereto shall be made by the Commission for publication. After a complaint is issued, no statement in regard to the case shall be made by the Commission for publication until after the final determination of the case.
>
> After a complaint has been issued and the answer of the respondent has been filed, or in case the respondent fails to file an answer by the rules provided, the papers in the case shall be open to the public for inspection, under such rules and regulations as the Secretary may prescribe.

Commissioner Thompson dissented.

On April 15, 1925, the Commission by the same majority, voted to dismiss the application for formal complaint against the Kennecott Copper Corporation, charged with acquiring the stock of the Utah Copper Company, in violation of Section 7 of the Clayton Act. Commissioners Thompson and Nugent dissented.

On April 30, 1925, the Commission announced the Rule of April 15, 1925. Notwithstanding the rule, Commissioners Thompson and Nugent, on May 2, 1925, released a public statement setting forth the grounds of their dissent in the Kennecott Case.

On May 18, 1925, public statement was made by Commissioners Thompson and Nugent of their dissent to the new rules. It was prepared by Commissioner Nugent, and may be summarized briefly as follows:

> The minority voted for the Rule of February 7, 1923, as an experiment to relieve the congestion of the docket. It was rescinded on October 17, 1923, because they were convinced after applying the Rule, that it was unfair. The injured competitor, as well as the public, is a necessary party to the action. When complaints are dismissed, without informing the public of the reason for the dismissal or the name of the respondent, the honest trader or manufacturer is not afforded the protection which the statute contemplates. The purchasing public have the right to know the name of the manufacturers and merchants who have deceived them by misbranding, false advertising, adulteration of product, etc. The dishonest respondent can blame only himself for the loss of patronage that may ensue; and the honest competitor is entitled to any advantage he may reap by reason thereof.
>
> It is the duty of the Commission to put a stop to unfair methods of competition. That can only be done by "pitiless publicity," concerning the wilfully guilty. Publicity will deter others who might be tempted to indulge in such practices.
>
> The procedure as it existed before the new rules was eminently fair. The change which allows the respondent to appear before the Board of Review is unfair and unjust. The respondent's statement to the Board is not made under oath, and there is no provision for any challenge of the statement.

Mr. Nugent further stated that he approved the discontinuance of the statement to the press on the issuance of a complaint; but that he disapproved the withholding of the complaint until answer is filed, because the complaint is a public record; and that he was unalterably opposed to the rule against publicity of cases dismissed on stipulation.[3]

The dissent closes with a defense of the Commission's former procedure based on statistics, taken from the Commission's Annual Report to Congress for the fiscal year ending June 30, 1924. It is sufficient to indicate these. During the nine years from July 1, 1915, to June 30, 1924, the Commission received 8,661 applications for complaint. 4,990 were dismissed, without comment or publicity, after preliminary inquiry. The balance, 3,671, were docketed and investigated. Of these, 2,703 were dismissed, without publicity, and formal complaints served on the remaining 968. (These complaints, of course, were made public.) Out of the 968 formal complaints, 298 were dismissed, after trial or otherwise.[4]

It is interesting to note that, during the period from May 13, 1925, to June 30, 1925, the Commission dismissed 29 formal complaints, presumably by

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3. The following portion of the dissent should be given in the Commissioner's own language. It relates, presumably, to the publication of the minority's dissent in the Kennecott case, above referred to:

"It is contended in certain quarters that the new rule *forbids* any publicity relating to the stipulations or agreements on which applications for complaints are dismissed and that any person who violates the rule is liable to fine and imprisonment under Section 10 of the Federal Trade Commission Act which reads, in part, as follows:

" 'Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.'

"It is also contended that members of the Commission who dissent from the action taken by the majority in approving said stipulations and in ordering the dismissal of said applications for complaint, are subject to prosecution under Section 10, should they, in making public the reasons for their dissent, refer to the contents of the stipulation.

. . .

"An order dismissing an application for a complaint is a *final* order, and I do not believe for a moment that a majority of the Commission can, by the adoption of a rule, legally prevent dissenting Commissioners from making public their views on such case or from quoting from the record, including stipulations, in support of such views, or that such rule, when violated by dissenting Commissioners acting in their official capacity, can subject them to the penalties provided by Section 10."

4. Reference to the Annual Report for 1924, shows some minor inaccuracies in the Commissioner's figures. As to the 298 formal complaints dismissed, the Report gives the following reasons for dismissal:

71—Controlling Court decisions.
43—Dismissed without prejudice, (because the cases were stale).
29—Respondent out of business.
19—Practice discontinued. (Note 4 cont. on next page.)

reason of the new rules.[5] To 21 of the dismissals Commissioners Thompson and Nugent dissented, to 2 Commissioner Nugent dissented, and to 6 there was no dissent. The unfair practices charged in these complaints included the following: Acquisition of the stock of a competitor, resale price maintenance, misbranding, false advertising, use of a lottery to promote sales, commercial bribery, destruction of a competitor's mail order catalogs, and conspiracy to prevent sales to a dealer not recognized as "regular".

Attention should be directed to the reasons given by the majority of the Commission, in support of the new rules, in their statement of April 30th:

> It has been the rule, which is now abolished, to issue a statement upon the filing of a complaint stating the charges against a respondent. In the opinion of the majority of the Commission this statement, which is given wide publicity, has resulted in many cases in damage to the respondent, and if such a case is later dismissed the publicity given the dismissal does not repair the damage, thus resulting in injustice. Of course the proceedings in the case must become public, but the majority believe it to be fair to withhold publicity until the respondent's answer is filed and then to make the complaint and the respondent's answer available to the press and public at the same time.
>
> The previous practice of filing complaints in all cases, even where the party has already ceased the practice and will probably never resume it, the majority deems to be a useless and oppressive practice, clogging the docket with cases not necessary to be tried, taking the time of the attorneys of the Commission uselessly, wasting the money of the Commission, and delaying the prosecution of cases which are contested and must be tried. Parties whose practices the Commission deems unlawful and who are willing to correct them should be encouraged to do so. Publication of their agreement to do so, however, does not encourage them. It rather deters them as many respondents, if their agreement is to be given publicity, to be used by their rivals, will rather contest the case.
>
> No good can be served by publishing these agreements, only harm to the respondent, and the majority holds that the proper function of the Commission is corrective and not punitive. Parties, whose acts deserve punishment, should be dealt with by the Courts and it is not within the province of the Commission to usurp that function.

Attention should also be directed to President Coolidge's statement in his message to Congress, of December, 1923:

> Revision of procedure of the Federal Trade Commission will give more constructive purpose to this Department.

The changes in the rules have brought forth the same protest as the Wadsworth-Williams Bill. One Senator, long a staunch supporter of the Commission, is recently credited with a statement that the Commission should be abolished because the President has "packed it with reactionaries". However, on July 29, 1925 (in a press article by David Lawrence), the President is credited with a statement that he will listen neither to the radicals, that the Commission should be abolished, because it is ineffective, nor to the conservatives, that it meddles too much in business, and therefore should be eliminated.

That there has been a sharp break between the majority and the minority of the Commission cannot be denied.[6] It will be indeed unfortunate if the situation within the Federal Trade Commission becomes as intolerable as that lately existing within the Tariff Commission. The break resolves itself into a fundamental difference in conception of the purpose and policy of the Commission. It must be borne in mind that the Commission is the successor in law and fact of the Bureau of Corporations, an institution initiated by Roosevelt. The Bureau was designed to solve the "trust" problem, in accordance with the policy of the Roosevelt administration, by compiling information about "Big Business", and by arousing public opinion against oppressive business practices by wide-spread publicity of the facts. The entire personnel of the Bureau was taken over by the Commission, and many of the Bureau's agents and investigators are still with the Commission. It was but natural that the Bureau's publicity policy was continued by the Commission. The minority's point of view is well expressed in the dissenting opinion of May 18th. The Commission (they conceive) has not enough power, and needs all its weapons, including publicity. The defrauded public (including the injured competitor) are to be considered, rather than the feelings of the respondent. The public policy of the United States has been formulated, and is opposed to monopoly and restraint of trade; and it is by the prevention of unfair and oppressive business methods, and those practices which tend to paralyze the competitive system, that the federal government, through the Commission, must preserve the integrity of this policy. The majority, on the other hand, regard the Commission as an instrument in formulating new standards of business legality. Since the standards are new, business men must not be too harshly treated in establishing them. It is unfair to honorable business houses to subject them to public odium and reproach, because they must now be brought to abandon commercial usages long accepted as proper and lawful. The truth of course, lies between these views, and partakes of both.

Two opinions may be ventured. First, the recent revolution in policy is a good thing, if the Commission can now come together, compromise their differences and work in harmony. Second, the revolution is more apparent than real.

The Rule of February 7, 1923, would seem to be a good one. The dissenting opinion gives no illustration of the hardship which, it is claimed, the Rule produced.

Abandonment of the publicity of charges pre-

11—Insufficient public interest.
23—Lack of Interstate Commerce.
7—Disposed of by civil litigation (between respondent and applicant for complaint).
2—Faulty pleadings.
14—Miscellaneous.
38—Respondent's practice held not unfair or unlawful.
43—Lack of proof.

298—Total.

5. The 29 complaints were dismissed for the following reasons:
4—Dismissed, (no reason assigned).
1—Dismissed, without prejudice (no reason assigned).
2—Dismissed, the practice complained of having been abandoned.
2—Dismissed, the practice complained of having been discontinued, and the respondent having agreed not to resume it.
1—Dismissed, the act complained of having but a single instance, never repeated, which the respondent agrees not to commit again.
10—Dismissed, without prejudice, the practice complained of having ceased before the charge was brought.
2—Dismissed, no substantial lessening of competition shown.
2—Dismissed, no interstate commerce shown.
5—Dismissed, the Commission being now fully advised in the premises.

6. On June 12, 1925, the Commission announced that, in conformity to Act of Congress, (Public—No. 586-68 Congress,) no investigation would be undertaken by it at the request of either House of Congress alone, except investigations of alleged violations of the anti-trust acts, and employees were ordered not to expend any funds of the Commission otherwise. Commissioners Thompson and Nugent dissented, to file a public statement later. To date this statement has not been filed, and the reasons for the dissent have not been publishd. An Associatd Press dispatch of June 20, 1925, stated the reason of the dissent to be, that the Commission should not hold its employees responsible if improper expenditures were made, unless it first specified what investigations should go on, under the provision of the Act. The truth of this dispatch cannot, of course, be vouched for.

ferred against respondents is a wise reform. The practice is opposed to our Common Law heritage, the presumption that the accused is innocent until proven guilty. By the Commission's own figures, out of the 298 complaints dismissed, 81 were dismissed, either because the charges could not be proven, or because the Commission was forced to admit that the respondent's practices were not unfair or unlawful. That is, over 27% of the complaints had to be dismissed because they could not be substantiated. Withholding the files until the answer is filed will work no serious hardship in the prosecution of the Commission's cases. Prevention of publicity until the final order is a moderate restraint upon a tremendously effective power.

That no publication shall be given to cases settled by stipulation and without complaint, is essentially the former practice. The only difference is that more cases will be affected, by reason of the added opportunities to stipulate and discontinue the practice. The rule does not prevent the applicant for complaint being informed as to the disposition of the case. The public is not presumed to have been advised of the application, and cannot be held entitled to information as to the disposition of the case.

The provision made for a hearing before the Board of Review, it is believed, is of little practical importance. The Board must be convinced that a complaint should issue, before the respondent can be called before it. The most the respondent can hope to do is to present some facts not known to the Board, or by argument change their opinion as to the application of the law. Business men will not ordinarily care to furnish to the Board, already convinced that they have violated the law, any information which would be useful in the prosecution of the case. It is extremely unlikely that the Board, which has briefed and reviewed hundreds of cases, will change its views as to the law. It is probable, that this provision, requiring three weeks' notice, will result in retarding, not accelerating, the Commission's work.

It seems impractical to provide so many opportunities for the respondent to repent and stipulate. If the respondent, after a fair presentation of the government's views, is not willing to stop the practice and stipulate, he should be compelled to stand out in the open, and fight the case publicly. It seems equally impractical for the Commission to tie the hands of its legal staff by directing that all cases *must* be settled by stipulation, unless the public interest demands otherwise. Any stipulation is seldom more than a compromise statement of facts—a half truth. A shrewd respondent will be quick to take advantage of the government attorney's limitation in this respect.

The statement that the Commission will not hereafter entertain purely private controversies, is a reflection upon the Commission in the past, and upon the integrity of its members. What constitutes public interest is necessarily a matter of opinion. A former Commissioner was wont to say that, "No injured competitor is too humble to obtain redress from the Federal Trade Commission." Another former Commissioner frequently said, "The injured competitors are the eyes of the Commission." It is difficult to perceive the public interest in a controversy between two rival orangeade vendors in the District of Columbia. On the other hand, the "Pittsburgh Plus" case was as vital to the public, in many respects, as the prosecution of the United States Steel Corporation under the Sherman Act. One reason for the multitude of petty cases instituted by the Commission, was its early declaration that such practices as misbranding, false advertising, commercial bribery, and the like, were legally and economically wrong and must be stamped out. To stamp out all the cases, it necessarily has to prosecute many small ones. The public interest is not apparent in the prosecution of one petty trader, who stamped pencils with gilt and sold them as "gold engraved". But when a number of these small fry are all prosecuted at the same time, by simultaneous complaints, in an effort to stop all engaged in the practice, the public interest is more apparent, as the aggregate injury to the public may be appreciable. There is no question but that Commissioner Nugent is correct in his statement that no Commissioner ever voted for a complaint, without believing that it was in the public interest.

For still more cogent reasons the change is more apparent than real. The Commissioners may propose, but it is their legal staff who must dispose. The investigators and trial attorneys, taken in the aggregate, are more familiar with the laws they enforce than the Commissioners, and far more familiar with the wiles of the unscrupulous business sharks they prosecute. The staff have built up a procedure out of long practice, and changes in it must be grafted onto the old practice—and this is as it should be. Moreover, business men themselves, individually and through their associations, have labored hard to improve business morals. They are an important part of the public the Commission serves, and will not tolerate a return to former conditions. This part of the public will insist that the Commission punish the guilty.

The new rules do not provide some long needed improvements. It has long been a subject of criticism that the Commission writes no opinions in respect to its orders to cease and desist. The findings as to the facts present the circumstances complained of, and the order to cease and desist states what may not be done, but neither the findings nor the order advise the respondent (or the public) *why* his conduct is considered unlawful. As a practical matter it is believed that if the Commissioners were obliged to write opinions to support the cease and desist orders it would have a wholesome effect, not only upon the respondents and the public at large, but upon the Commission itself. The Wadsworth-Williams Bill included this feature, and the Commission should provide for it.

Neither the Wadsworth-Williams Bill nor the present revision of the rules provides for any statement of the reasons for dismissal of complaints. A respondent is certainly entitled to know why the complaint against him is dismissed, just as much as he is entitled to know why the complaint is followed by an order to cease and desist. For even stronger reasons the public is entitled to know these facts. No case should be dismissed without a careful and comprehensive statement of the reasons therefor.

In conclusion, it should be urged again that the Commission compose its differences, and work together harmoniously, for its future interest and the public welfare.

THE UNITED STATES BOARD OF TAX APPEALS*

Methods of Body Created by Congress in 1924 to Provide Tribunal Independent of Treasury Department for Hearing and Determination of Controversies Between Taxpayers and Bureau of Internal Revenue Relative to Assessment and Collection of Additional Taxes

By J. GILMER KORNER
Chairman United States Board of Tax Appeals

MR. Chairman and Gentlemen: The United States Board of Tax Appeals was created by Congress in the Revenue Act of 1924. The purpose of its creation was to provide a tribunal within the executive branch of the government, which should be independent of the Treasury Department, for the hearing and determination of controversies between taxpayers and the Bureau of Internal Revenue, relative to the assessment and collection of additional taxes. Theretofore the administration of the tax law in the executive branch of the government had been reposed exclusively within the Treasury Department. This system gave rise to the criticism, among the taxpaying public, that under it there was not that degree of impartiality and independence in the appellate bodies within the Treasury Department, as was desirable. Whether or not such criticism was in all its aspects justified is not now a matter of concern. However, the discussion thus invoked resulted in the establishment of the Board of Tax Appeals which in the language of the statute creating it became "an independent agency in the executive branch of the Government." Thus it should be observed, the Board is not within a branch of, or connected with the Treasury Department.

The effect of the creation of the Board of Tax Appeals is to give the taxpayer a chance to have a trial of his case and a determination of the proper amount of his deficiency before he is required to pay it. The effect of the filing of an appeal is to stay assessment and collection of the tax until a decision has been rendered by the board. If the board's decision is favorable to the taxpayer, Congress has provided that the Bureau of Internal Revenue may not assess or collect the assessment without first bringing action and securing a judgment of court. If the board's decision is favorable to the government, the tax may then be assessed and collected. Thereafter the taxpayer may sue in the courts to recover the taxes so paid. Here, however, the board's determination may become an important factor, because Congress has enacted that the board's findings of fact shall be prima facie evidence of the facts therein stated in any proceedings in court wherein the government sues to recover judgment for such a deficiency, or wherein the taxpayer sues to recover back any amount paid in pursuance of a decision of the board.

The Board of Tax Appeals, then, is in effect a judicial tribunal of limited jurisdiction. It has power to review determinations of the Commissioner of Internal Revenue with respect to income and profits taxes, estate taxes, and the new gift tax. A number of questions have arisen as to the extent of the jurisdiction of the board over taxes assessed under past revenue acts. The board has decided in one litigated case that it has no jurisdiction over claims for refund.

The statute provides that the members shall be appointed by the President, by and with the advice and consent of the Senate. Upon its organization, the first problem with which the board was confronted was that of determining its policy with respect to rules of practice. Congress left the question of formality of procedure to the judgment of the board; so it became necessary to decide whether to provide for very informal proceedings, or for strictly technical rules, or for some system between the two. As has been stated, the board is not a newly created appeal body of the Bureau of Internal Revenue, or even of the Treasury Department. If the board were within the bureau the entire records of the bureau would be available to it, and all of the administrative aspects of each case would need be considered. Thus, the taxpayer would be in much the same situation as he was before the creation of the board.

But it was apparent that Congress did not so intend. The language of the statute, the debates in Congress, and the committee reports of Congress, make it clear that such was not the intent, but that the purpose was to create an independent agency with no motive but to apply the law to the facts in each case and reach the correct answer in that case. The board has no function to perform in connection with the collection of the revenues, and hence is bound by no administrative precedents or policies. Its concern is to see, on the one hand, that the citizen is not unjustly assessed, and, on the other, that in the collection of its just revenue the government is not unduly delayed The board represents neither party. Both parties are represented by their own advocates.

The statute provides that the hearings of the board shall be public, and that all evidence shall be open to public inspection. The board must not only decide the ultimate question of liability, but it must make a written report of its findings of fact, and its decision. In cases in which more than $10,000 is involved, an opinion must be written. As a matter of practice, however, the board has written many opinions in cases of less than that amount. This is done because, in the opinion of the board, the principle involved is important.

The board is composed of 15 members at the present time. One member is elected by his fellow members as chairman. The remaining 14 members

*Address delivered on September 3, at the annual meeting of the American Bar Association Detroit, Sept. 2-4, 1925.

are divided into 4 divisons. Two divisions have 3 members each, while two have 4 each. The divisions constitute the hearing units, and each division has a hearing room in which appeals assigned to it are heard. At the head of each division there is a division chief, who ordinarily presides at the hearings in his division.

The machinery of the board is, briefly, as follows:

Upon the receipt of an appeal from a taxpayer it is given a number and then docketed. A copy of the petition is forthwith served upon the Solicitor of Internal Revenue, who is the law officer of the Commissioner. The Solicitor is given 20 days in which to answer or move in respect to the petition. When the Solicitor has thus answered or filed a motion in respect to the petition, a copy thereof is forwarded to the taxpayer by registered mail, and thereupon the case is considered at issue in the board. When issue is thus joined, the appeal is transferred to a Day Calendar for hearing, and set at a day not less than fifteen days hence. The Commissioner is notified of this date, and the taxpayer is also notified by registered mail.

At 9:30 A. M. on each hearing day the parties litigant, with their counsel and witnesses, assemble in one of the hearing rooms of the board. At that time the Chairman calls the calendar for that day, and notes the appearances and readiness of the parties to go forward with the appeals set for that day. The appeals in which issue is joined on motions of one kind or another are separated from those appeals in which issue is joined on the merits.

The appeals involving motions are all assigned to one division for disposition. This is done in the interest of expedition and economy of time. The cases which are for hearing on the merits are then assigned for hearing to the divisions, in the order of their appearance on the Day Calendar. One appeal is assigned to each division sitting. The remaining appeals which have been announced as ready are held in abeyance, and are thereafter assigned to divisions in the order in which they appear on the Day Calendar and as the divisions become vacant. That is to say, as soon as a division has completed the first hearing assigned to it, the chairman is notified and the next appeal on the list is assigned to that division. In this manner the divisions are kept busy throughout the day, or until the hearings for that day are completed.

In the division the hearings are conducted substantially as in the courts, except that there is no jury. Because there is no jury, the strict rules of evidence obtaining in law courts are relaxed, and the rules of evidence observed are more nearly those obtaining in courts of equity. The taxpayer has the opening and closing of the case, both as to evidence and as to argument. Counsel for both parties make opening statements in which are outlined the nature of the appeal, the points in controversy, and the respective contentions of the parties. The taxpayer then proceeds with the introduction of his evidence. This may be by witnesses who are sworn and placed on the witness stand, or by competent and authenticated documents. The testimony of witnesses is reported by a court reporter, and transcribed and made a part of the record. Documents and other exhibits which are admitted as evidence are identified, marked, and received into the record. The rules of the board provide for the taking of evidence by deposition on either oral or written interrogatories. The practice in this respect is similar to that obtaining in court. An order for the taking of depositions issues from the board upon application therefor made in accordance with the rules.

At the close of the evidence, argument is heard on behalf of both parties and the case is then taken as submitted. In cases in which either or both parties desire to file written briefs, the time for such filing is granted, and the case is deemed submitted at the expiration of the time allowed for that purpose.

When a case has been submitted, the division which has heard it takes the case under advisement and reaches an agreement as to the proper decision. Thereupon the division prepares a report, which consists of the findings of fact, the decision and an opinion, if an opinion is required or is deemed necessary. This report is mimeographed, and a copy sent to each member of the board for consideration and study.

The statute provides that a division decision shall become the decision of the board at the expiration of thirty days unless within that time the chairman shall refer the decision for consideration by the whole board. Up to the present time the practice has been followed by the chairman of referring every case to the whole board for adoption. This is to preserve uniformity of decisions, and at the same time to allow each appeal to have the benefit of consideration by every board member. As stated before, the division decision is sent to each member, who studies it, and if he is in disagreement he prepares a statement of his views relative thereto.

On Friday and Saturday of each week the board meets and discusses the proposed opinions submitted by divisions during the preceding week. At these meetings the fullest discussion of each case is gone into, and thereafter a vote is taken on a motion to adopt. To this date every decision and opinion which has been adopted has had this consideration and discussion by the board.

When the board has reached a decision in an appeal, a certified copy thereof is forwarded to the taxpayer, and likewise one to the Commissioner of Internal Revenue. In addition to this the decisions and opinions of the board are published in printed form by the Government Printing Office. This publication is known as the Reports of the United States Board of Tax Appeals, and is cited as "B. T. A."

In the statute creating the board, Congress provided that the principal office of the board shall be in the District of Columbia, but that the board or any of its divisions may sit at any place within the United States. It is provided that the times and places of the meetings of the board, and of its divisions, shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the board, or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

With a view to effectuating this intent of Congress, the board, soon after its organization, adopted a mimeographed letter, a copy of which was forwarded to each taxpayer who filed an appeal. This letter advised the taxpayer that it was the intent of the board to hold hearings in localities as convenient as practicable to taxpayers, and requested taxpayers to indicate their desire in the premises. With a year behind us now, experience has shown that approximately 85 per cent of the taxpayers

prefer to have their cases heard in Washington.

The requests which have been made for hearings in the field have come almost exclusively from the states west of the Mississippi River. By the month of April, 1925, about 200 cases had been calendared in the Northwest and Pacific Coast States, and accordingly plans were made to send a division into that territory.

On May 2, 1925, a division of three members, accompanied by two law clerks and two secretaries, went forth. During the months of May, June and July they sat in Milwaukee, St. Paul, Seattle, Portland, San Francisco and Los Angeles.

The board has been in existence a little over a year. It was about two months after organization before the board began to function in the hearing of cases. During the year ending July 1, 1925, 5,220 appeals were filed. Of that number the board has disposed of and taken under submission 2,422. We calendar on an average of 180 cases per week, and thus far we have kept within 30 to 45 days of joinder of issue in all appeals. By that I mean that at our present rate we have been able to hear appeals within 30 to 45 days after they are at issue.

The Board is still a new creation. It must prove its *raison d'être*. It is striving hard to do so. It is treading on new ground, and before it can be determined whether the purposes behind its creation have been accomplished, many problems must be disposed of. Some of its decisions may be criticized. The Board may make mistakes. It is quite probable that it will. It is practically without judicial decision to guide it. Compared with the wide variety of issues presented to the Board for determination the court decisions are negligible. The Board must, therefore, blaze its own trail to a very large extent. To do this properly requires legal and technical assistance of a high order. The Board earnestly desires that assistance, and this brings me to a phase of my remarks to which I solicit your careful thought.

Since the advent of the income tax there has been a rather widespread criticism directed at both the revenue statutes and to their administration. The courts have not infrequently called attention to the difficulty of interpreting these statutes while the public, to a larger degree than is perhaps justified, has directed its criticism at the administration of these statutes. It must be admitted at the outset that our federal taxing statutes are *not* always easy of interpretation or administration. These statutes are of necessity very broad in their scope since they must be universal in application and must needs apply to an extremely wide diversity of subjects and persons. It follows that to attain their objective these statutes must necessarily be intricate. Such a statute *should* have, and *ought* to have, the best legal and technical talent and skill available to assist in its construction. This applies with equal force to its interpretation and administration.

I have had something over four years experience with our income tax laws; first in our federal courts, in the preparation and trial of tax cases, and later in the administration of the laws as Assistant Solicitor of Internal Revenue, and lastly as a member of the Board of Tax Appeals. I have observed the criticisms just alluded to, and have pondered their cause and their solution. I have been led to the conclusion that the bar of our nation is in some degree, and to my mind to a very considerable degree, responsible for the conditions giving rise to such criticism. The sin is one of omission rather than of commission. In my opinion the bar of our country is chargeable with the neglect of a great and important branch of the law.

It needs no word of mine to demonstrate the gravity of an income tax law. A moment's contemplation reveals that it touches the lives of more persons than any other civil law—to say nothing of its intimate relationship to business. Its importance therefore cannot be exaggerated. With this premise it naturally follows that such laws enlist the interest as well as the study of that profession best fitted by training to be of material aid in improving them.

Our profession is an old one with honored traditions and precedents. Taxation such as we have under the sixteenth amendment is new by comparison. Taxation has never enlisted the interest and attention of our profession which its importance deserves. Indeed, to a great majority it is uninteresting or even distasteful. This is because they are ignorant of its absorbing interest. Lawyers who have made it a study or a specialty can testify to the accuracy of this statement. Such an one might be accused of partiality of judgment in this particular but I am convinced that in no branch of the law is there a wider application of the principles of substantive law than in income tax cases. The issues presented by such cases run the whole gamut of law—corporations, trusts, domestic relations, banking, torts, partnerships, contracts, real property, and even criminal law where fraud is involved. There is no specialist in the profession whose talents are not needed in constructing and administering this broad and important branch of the law.

It is a matter of comment that lawyers and law firms engaged in general or special practice refer their clients with tax problems to others or delegate this important work to law clerks. Whether this is due to a failure in appreciating the gravity of the matter or a disinclination to deviate from the paths of habit, I do not know. However, I do feel that in such instances an injustice is apt to be done to the client and the courts and administrative bodies are deprived of the benefit of the counsel and advice which the importance of the subject deserves.

We hear much now-a-days about the great strides made in the profession of medicine during the last few decades. This is because that profession has applied itself to solving new problems—or to speak more accurately, to ascertain the cause of old ills and find new remedies to end them. Whether or not taxation may be classed as an ill, is not the question for present consideration. We will all agree, however, that unscientific taxation *is* an ill and should be approached with the same determination for its eradication as is displayed by the medical profession in stamping out disease. The advance made in curing human physical ills is due to the general and widespread interest of medical men in improving conditions, and their willingness to go studiously into new fields of research and practice. If there be ills of taxation it rests with the legal profession to show the same interest and determination in their remedy. The field is a large one and is of vital importance to our civic and business life. The lawyer who enters that field will have his rewards. The practice is remunerative, it is absorbingly interesting and last, but by no means least, there is the satisfaction of contributing professionally to a greatly desired end—namely, wiser tax laws wisely administered.

SHALL WOMEN THROW AWAY THEIR PRIVILEGES?

By Edward Clark Lukens
Of the Philadelphia, Pa., Bar

IT is amazing to anyone familiar with legislation for the protection of women that an effort the success of which would mean the end of all such protection should be made by women. A resolution to amend the Constitution has been introduced in Congress which provides that "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction." The author and sponsor of this proposed amendment is the National Woman's Party, which announces as its object the "removal of all discriminations in the law." Whether the group that is conducting the campaign in favor of this measure understands its import matters not. The danger is that the great mass of voters, especially the women, will favor it because they do not understand it.

"Equality" is a pleasing word, and we have come to regard "discrimination" as a displeasing word. But equality may involve reduction as well as addition, and the removal of discriminations means the loss of privileges as well as the removal of handicaps. It must not be assumed that equal rights for women in all respects means greater rights for them, nor that the discriminations which the amendment would remove would all be discriminations against them.

What the amendment really means is that neither the United States nor any state shall enact any statute under which the rights of men and the rights of women are not equal, and that all existing statutes shall be invalidated, in so far as they contain instances of unequal rights, and furthermore that the common law inequalities, where still in force, shall no longer be applied by the Courts. The effect would be to render invalid any law which gives men rights not given to women, or which gives women rights not given to men, at least as far as such discrimination is concerned. A statute discriminating in favor of women would of course be as invalid as a statute discriminating in favor of men. If disabilities are taken away, privileges must be taken also. If rights must be equal, duties must be equal.

It is not to be denied that there are real injustices which the Woman's Party is striving to remedy. There are situations, especially in regard to disposing of real estate and the making of certain kinds of contracts, in which the married woman is powerless to act without the joinder of her husband. Under the common law the wife's legal personality was almost completely merged in the husband's, as far as property and contractual rights were concerned. Except as to political rights, her restrictions centered upon the fact of marriage rather than upon her sex, a single woman or widow having full contractual powers. Most of the states within the last half century have enacted "Married Women's Property Acts," removing some, but not all, of the common law disabilities. The statutes of the several states vary considerably, some being less liberal than others, but there is every reason to believe that as time goes on the states that have been backward in this respect will follow the lead of the states that have removed the ancient disabilities, and that the few disabilities remaining in the more modern statutes will gradually be eliminated. Efforts to hasten progress toward this result, especially in those states in which little has already been done, will probably commend themselves to all but the most conservative.

When, however, a group of women asks us at one stroke to render it impossible for the rights of women to be either greater or less than the rights of men in any subject whatsoever, it behooves us to look carefully at the possible results. Those who would benefit women must use care lest in removing restrictions they rob them of privileges. Let us therefore look at a few situations in which the equalization process would work in the opposite way to the one chiefly intended. To list completely the existing Federal and State statutes under which women have some right or privilege not granted to men would be tedious. It will suffice to point out a few of them in order to illustrate the danger.

First and foremost, we have the great mass of legislation protecting the working conditions of women. These statutes vary greatly in detail, but there are only four states in the Union that do not have some law limiting the hours of work for women. Nine states have an eight hour limit, while in the majority the limit is nine or ten hours. Eighteen states also have statutory regulations providing for a day of rest, time for meals, or rest periods for women laborers. Sixteen states prohibit night work for women in certain industries or occupations. Thirteen states have laws establishing a minimum wage for women workers.

These statutes apply to women only, treating the question of their working conditions as a subject apart from other labor legislation. To apply the same limits to men would be possible neither constitutionally nor practically. Such laws are restrictions not only upon the employer's right to employ, but also upon the woman's right to work. From a legal standpoint they are restrictions upon the employees, though from an economic and social viewpoint they are for their protection. Equality in legislation, compelled by constitutional amendment, would sweep away this entire body of protective law and bring back the woman worker to her former position which made such laws necessary and caused them to be enacted.

Next in importance come the desertion and non-support laws. Most of the states have laws either making it a penal offense for a man to desert and fail to support his wife and children, or enabling the court to compel such a husband or father to make periodical payments for their support, or both. The courts having jurisdiction in this matter are exceedingly busy, and thousands of dollars are collected for destitute families from deserting husbands through their process. There is no provision in these statutes for compelling a deserting wife to contribute to the support of her husband, and the statutory basis for these "support orders" would fall, under the equality amendment. The unfortunate wives who bring their petitions to these courts come asking for support and not for equality. In the large cities they come in great num-

bers. They ask for bread, and shall we give them a stone by telling them that their husbands can desert them with impunity because women have been granted equality?

In Pennsylvania we have a "Mothers' Assistance Fund Act," providing for monthly payments by the state to poor and dependent mothers under certain circumstances, especially where they are widowed. Would the advocates of equality favor fathers' assistance, or would they rob the widow of her mite in order that she may enjoy equality?

The statute books of the states are filled with laws of somewhat less importance, but of great variety, giving some special privilege or immunity to women as as class. A widow in Pennsylvania is allowed an "exemption" of $500 out of the property of her deceased husband, free from the claims of his creditors, so that she is not left utterly penniless if he dies insolvent. It is difficult to see how widows could be given a privilege as a class, if no privilege could be given to women.

The vagrancy laws of several states exempt women from liability to arrest as vagrants, and the statutes allowing arrest on civil process in certain classes of damage suits generally exempt women, or at least married women, from such arrests.

Some difficulties would crop up under this amendment, intended by no one, which would be difficult to get around, in spite of their absurdity. Under the Federal Statute regulating the Army, which provides that recruits enlisting in the Army must be effective and able-bodied men between the ages of sixteen and thirty-five years of age, it would be difficult in the face of the proposed amendment to exclude effective and able-bodied women of the prescribed age, and it might become the popular practice for our debutantes to serve a short enlistment in the infantry.

The liberation of women has been one of the great social changes of the past century, and no one can say that it has been entirely completed, but the changes in law that have accompanied it have not been its cause nor its most important result. The changes in law have merely registered the changes of public opinion in such matters as are capable of legislative control.

There are many ways in which the position of women has improved that are economic and social. The most effective efforts of those who have sincerely and intelligently desired to help women, whether in the field of legislation or in other fields, have been directed toward the solution of problems and the alleviation of hardships which are peculiar to women. The legislation cited represents an attempt to make women more nearly equal to men in the competitive struggle than nature has made them, by allowing them privileges and immunities not given to men. The physical handicap which nature places upon women cannot be removed even by constitutional amendment, and the laws and customs of civilization recognize this handicap and seek to protect women from dangers and hardships that may result from it. The kind of legislation that assists in this beneficent purposes rests upon the difference between women and men, and a system of law which refused to recognize this difference would be cruel to women. There are various forms of protection that women need and that men do not need.

It is surprising indeed that women should seek to throw away these protections. Do they really want to be allowed to work at night in factories and mills? Would they rather not be able to compel deserting husbands to support them? Or is it the women who do not work in factories anyhow, and who do not need their husbands' support, who desire an empty equality at the expense of their less fortunate sisters' real welfare?

Let no woman nor man favor this amendment with closed eyes, and fail to see the ugly thing that lurks behind the alluring mask of equality. A few women favor the measure because they are out of touch with the real facts of life's struggle; the danger is that many will favor it because of ignorance of the results that it must bring. If women act in ignorance, and men follow them through stupid sentimentality, the efforts of a century of true liberalism may be sacrificed to a fetish based upon a falsehood. If women become awake to their own interests, and men temper their chivalry with common sense, the way will be left open for further progress toward the real safeguarding and elevation of womanhood.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912

Of American Bar Association Journal published monthly at Chicago, Illinois, for October 1, 1925.

State of Illinois }
County of Cook } ss.

Before me, a Notary Public, in and for the State and county aforesaid, personally appeared Joseph R. Taylor, who, having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to-wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association, Wm. P. MacCracken, Jr., Sec., Chicago, Ill.

Editor-in-Chief, Edgar Bronson Tolman, 30 N. LaSalle St., Chicago, Ill.

Managing Editor, Joseph R. Taylor, 38 S. Dearborn St., Chicago, Ill.

Business Manager, Joseph R. Taylor, 38 S. Dearborn St., Chicago, Ill.

2. That the owner is: American Bar Association, Chester I. Long, President, Wichita, Kan.; Wm. P. MacCracken, Jr., Secretary, 209 S. LaSalle St., Chicago, Ill.; Frederick E. Wadhams, Treasurer, 78 Chapel St., Albany, N. Y.

3. That the known bondholders, mortagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

Joseph R. Taylor, Business Manager.

Sworn to and subscribed before me this 8th day of October, 1925. (SEAL) Raymond L. Greist.

(My commission expires Oct. 28, 1925.)

REVIEW OF RECENT SUPREME COURT DECISIONS

Government Subsidies to Railroads for Certain Purposes Not Taxable as Income—Salaries of Federal Judges and the Taxing Power—Increased Value of Stock on Corporate Reorganization Under Certain Circumstances Held as Income—Domestic and Foreign Exporting Corporations—Deductible Loss Under Revenue Act of 1919—Estate Tax and Proceeds of Insurance Policies—State Without Power to Tax Transfer of Tangible Personal Property Having Situs in Different State—Other Tax Cases

By Edgar Bronson Tolman

Federal Income Tax,—Income Defined

Government subsidies, in money and property, paid to induce railroads to extend lines and in consideration for the reduction of rates, are not subject to taxation under the Sixteenth Amendment.

Edwards v. Cuba Railroad Company, Adv. Ops. 717, Sup. Ct. Rep. v. 45, p. 614.

This decision, in distinguishing governmental subsidies from earnings, adds another point of definition to the answer to the question, What is "income" within the meaning of the Federal Income Tax statutes? Plaintiff was a New Jersey corporation engaged in the operation of a railroad in Cuba. In accordance with the laws of that country, the Cuban government had advanced to the railroad company a subsidy of lands, buildings and over a million and a half dollars in money. The subsidy was given in consideration for the extension of certain lines, and the reduction of certain rates, both on government traffic, and with respect to ordinary fees. The railroad constructed its lines and promulgated its tariffs in accordance with this contract. The money payment it credited to capital account. But the Commissioner of Internal Revenue assessed and collected income tax under the Act of 1916 upon the amount so received by the railroad, and this suit was brought to recover the sum of $20,239.18, paid under protest. The District Court for the Southern District of New York gave judgment for the railroad, and, on writ of error, the Supreme Court affirmed the judgment.

Mr. Justice Butler delivered the opinion of the Court. After rehearsing the relevant provisions of the statutes, he adverted to the fact that such subsidies of railroads were common in the United States and were given usually to promote development of the territory to be served. He then said:

> Clearly, the value of the lands and other physical property handed over to aid plaintiff in the completion of the railroad from Casilda to Placetas del Sur was not taxable income. These were to be used directly to complete the undertaking. The Commissioner of Internal Revenue in levying the tax did not include their value as income, and defendant does not claim that it was income. Relying on the contract for partial reimbursement, plaintiff found the money necessary to construct the railroad. The subsidy payments were proportionate to mileage completed; and this indicates a purpose to reimburse plaintiff for capital expenditures. All—the physical properties and the money subsidies—were given for the same purposes. It cannot reasonably be held that one was contribution to capital assets, and that the other was profit, gain or income. Neither the laws nor the contracts indicate that the money subsidies were to be used for the payment of dividends, interest or anything else properly chargeable to or payable out of earnings or income. The subsidy payments taxed were not made for services rendered or to be rendered. They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment.

The case was argued by Mr. Alfred A. Wheat for the federal authorities and by Mr. Howard Mansfield for the railroad.

Federal Income Tax,—Federal Officers

The salary of a federal judge is exempt from federal income taxation although the judge took office after the taxing act was passed.

Miles v. Graham, Adv. Ops. 686, Sup. Ct. Rep., v. 45, p. 601.

In *Evans v. Gore,* 253 U. S. 245, it was held that Section 1, Article III of the Constitution, forbidding the diminution, during his term in office, of the compensation received by a federal judge, made it unconstitutional to levy income tax upon the salaries of such judges. In this case an unsuccessful attempt was made to distinguish the present situation from that in *Evans v. Gore,* by reason of the fact that here the judge had been appointed and inducted into office after the enactment of the taxing act (the Revenue Act of 1919). The contention of the Collector was that the invalidity of the provision of the Act taxing the salaries of federal judges, declared by *Evans v. Gore,* applied only as to judges that took office before the Act was passed. Plaintiff's suit to recover the tax was successful in the District Court for the District of Maryland, and, on writ of error, judgment was affirmed by the Supreme Court.

Mr. Justice McReynolds delivered the opinion of the Court.. He contented himself with quoting extensively from the opinion in *Evans v. Gore,* and then saying:

> The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.
>
> On September 1, 1919, the applicable statute declared: "The Chief Justice (of the Court of Claims) shall be entitled to receive an annual salary of $8,000, and each of the other judges an annual salary of $7,500, payable monthly." The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of *Evans v. Gore.*
>
> The taxing Act became a law prior to the statute

prescribing salaries for judges of the Court of Claims, but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of "gross income," "the compensation received as such" from the United States. From the "gross income" various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of "gross income," and to tax this as other salaries. This is forbidden by the Constitution.

Mr. Justice Brandeis dissented.

The case was argued by Solicitor General Beck for the Federal authorities and by Messrs. William L. Marbury and William L. Rawls for the judge.

Federal Income Tax,—Corporate Reorganization

The increased value of stock issued by a new corporation in exchange for a different kind of stock of a prior corporation, the assets of which it takes over, held subject to taxation as income to the holder.

Marr v. United States, Adv. Ops. 683, Sup. Ct. Rep. v. 45, p. 575.

This is the latest of a series of cases where the courts have been called upon to decide whether the increased value of stock issued pursuant to a corporate reorganization is income taxable to the holder. On the one hand are cases like *Eisner v. Macomber,* 252 U. S. 189, and *Weiss v. Stern,* 265 U. S. 242, where the stockholder was regarded as still holding all his original investment, and on the other are *United States v. Phellis,* 257 U. S. 156, *Rockefeller v. United States,* 257 U. S. 176, and *Cullinan v. Walker,* 262 U. S. 134, where the change of corporate identity and form of the investment was so great as to induce the court to declare that the stockholders had realized a taxable profit. In the present case the General Motors Company of New Jersey had accumulated such large profits that it caused to be organized a Delaware corporation with a larger capitalization. Each stockholder in the old corporation received for each share of common stock in the old corporation five shares of common stock in the new, and for every 7% share of preferred stock in the old corporation one and one-third 6% preferred shares in the new. The fractional shares were paid in cash. The Delaware corporation then absorbed the old New Jersey corporation. A stockholder, taxed upon a gain of $324,466.57 thus realized, brought suit in the Court of Claims to recover the tax paid under protest, but judgment was entered for the United States. Upon appeal, the Supreme Court, by a five to four decision, held that the case belonged with the *Phellis* and *Rockefeller* cases, sustained the tax, and affirmed the judgment.

Mr. Justice Brandeis delivered the prevailing opinion. The principal distinction upon which he relied lay in the fact that in *Eisner v. Macomber* the corporate identity was literally maintained through the reorganization and in *Weiss v. Stern* was substantially maintained, as the new corporation was organized under the laws of the same State. Moreover, there was no change in the character of the securities issued. But:

> In the case at bar, the new corporation is essentially different from the old. A corporation organized under the laws of Delaware does not have the same rights and powers as one organized under the laws of New Jersey. Because of these inherent differences in rights and powers, both the preferred and the common stock of the old corporation is an essentially different thing from stock of the same general kind in the new. But there are also adventitious differences, substantial in character. A 6 per cent non-voting preferred stock is an essentially different thing from a 7 per cent voting preferred stock. A common stock subject to the priority of $20,000,000 preferred and a $1,200,000 annual dividend charge is an essentially different thing from a common stock subject only to $15,000,000 preferred and a $1,050,000 annual dividend charge. The case at bar is not one in which after the distribution the stockholders have the same proportional interest of the same kind in essentially the same corporation.

Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland, and Mr. Justice Butler, delivered a brief dissenting opinion in the course of which they said:

> Weiss v. Stearn did not turn upon the relatively unimportant circumstance that the new and old corporations were organized under the laws of the same State, but upon the approved definition of income from capital as something severed therefrom and received by the taxpayer for his separate use and benefit. Here stockholders got nothing from the old business or assets except new statements of their undivided interests, and this, as we carefully pointed out, is not enough to create taxable income.

The case was argued by Messrs. William L. Frierson and James Byrne for the taxpayer and by Solicitor General Beck for the United States.

Federal Income Tax,—Exporting Corporations

A domestic corporation engaged in exporting cannot complain of discrimination by reason of the fact that while the domestic corporation is subject to federal income tax, foreign corporations engaged in the same sort of business are not.

National Paper & Type Company v. Bowers, Adv. Ops. 148, Sup. Ct. Rep. v. 45, p. 133.

Nor does it matter whether the foreign corporations are wholly exempt or only partly exempt from the operation of the income tax.

Barclay & Company v. Edwards, Adv. Ops. 402, Sup. Ct. Rep. v. 45, p. 348.

A domestic corporation engaged solely in the export business brought suit against the Collector of Internal Revenue to recover income tax imposed under the Act of 1921 and paid under protest. Plaintiff's contention was that the fact that it was subject to tax while foreign corporations doing exactly the same sort of business were not, amounted to "a hostile discrimination and confiscation of property" in violation of the Fifth Amendment. The Supreme Court affirmed judgment entered for the Collector in the District Court for the Southern District of New York.

Mr. Justice McKenna delivered the opinion of the Court. He said:

> Here the discrimination, if such it can be called, is in favor of foreign corporations in respect to taxation of earnings from business done in foreign countries. Clearly as to such business Congress may adopt a policy calculated to serve the best interests of this country in dealing with citizens or subjects of another country, and may properly say that as to earnings from such business, the foreign subjects or citizens shall be left to the taxation of their own government or to that having jurisdiction of the sales. Even if we were to concede, as we cannot, that the Fifth Amendment in enjoining due process of law requires as part thereof equality of taxation, it certainly could not be held to apply to a subject matter not within this country.

After pointing out that it might be good commercial policy to allow foreign corporations to conduct an exporting business without paying the tax required of a domestic corporation, he continued:

> And as the Government further points out, the foreign corporation must look to the country of its origin for protection against injury and redress of losses occurring in that and other foreign countries, and not to the United States. The Government, therefore, contends, and rightly contends, that domestic corporations are required to pay a tax on their incomes from all sources while foreign corporations are taxed only on their income from sources within the United States because, to repeat, only that income is earned under the protection of American laws.

In the *Barclay* case, a judgment for the collector was affirmed the same day upon the authority of the *Bowers* case, but the taxpayer later sought a rehearing, seeking to distinguish its case on the ground that it arose under the Act of 1918, under which foreign exporting corporations were *entirely* exempt from income taxation, instead of only *partly* exempt. But the CHIEF JUSTICE, in denying a rehearing, said with respect to the supposed distinction:

> But we do not think that that distinction makes any difference in the application of the principle upon which the judgment in No. 320 was based. Whatever the difference between the acts, whether the foreign corporations were wholly exempted or only partially exempted, they constituted a class all by themselves and could be properly so treated by Congress because of the considerations suggested in the opinion in No. 320. The attack made upon the law of 1921 for discrimination against American corporations in favor of foreign corporations was quite as vigorous in the briefs of counsel for the plaintiffs in error in No. 320 as in No. 547 and rested on the same argument, and while the exemption of the net income of foreign corporations from manufacture in the United States did not exist in the Act of 1921 as in the Act of 1918, the question of discrimination in the two cases only differed in extent and did not call for any real distinction in deciding them.

The cases were argued by Mr. Porter J. McCumber for the taxpayers and by Solicitor General Beck for the taxing authorities.

Federal Income Tax,—Deductible Loss

Under the Revenue Act of 1919 there is no deductible loss in respect to stock acquired before March 1, 1913, and sold in 1919 for more than the original purchase price, notwithstanding the fact that the sale in 1919 was for a sum less than its value on March 1, 1913.

United States v. Flannery et al., Adv. Ops. 460, Sup. Ct. Rep. v. 45, p. 420.

The Revenue Act of 1918 provides that for income tax purposes the basis for determining a gain derived or loss sustained from the sale or other disposition of property shall be "(1) in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date." In the present case the taxpayer had bought stock before March 1, 1913, for less than $95,175, which was the price he received for it when he sold it in 1919. But because its fair market value on March 1, 1913, was $116,325, his executors contended that although he had sustained no actual loss, the statute established the market value of the property on March 1, 1913, as the sole basis for ascertaining a loss sustained, and that therefore he was entitled to deduct the difference between that market value and the sale price in computing his income tax. When the executors were made to pay the tax, they brought this suit to recover the amount paid. Judgment rendered in their favor in the Court of Claims was reversed by the Supreme Court.

Mr. Justice Sanford delivered the opinion of the Court. He reached his conclusion from the premise that the provisions of the Act in reference to gains derived and losses sustained were correlative, and the authority of several cases wherein it had been held that the Act imposed a tax only to the extent that an actual gain was derived. After reviewing these cases, he said:

> These decisions are equally applicable to the Act of 1918. There is no difference in substance between the language of the two Acts in respect to the ascertainment of the gain derived or loss sustained from the sale of property acquired before March 1, 1913; and the correlative nature of these two provisions is emphasized in the Act of 1918 by their combination in one and the same sentence. As it was held in these decisions that the Act of 1916 imposed a tax to the extent only that gains were derived from the sale, and that the provision as to the market value of the property on March 1, 1913, was applicable only where a gain had been realized over the original capital investment, so we think it should be held that the Act of 1918 imposed a tax and allowed a deduction to the extent only that an actual gain was derived or an actual loss sustained from the investment, and that the provision in reference to the market value on March 1, 1913, was applicable only where there was such an actual gain or loss, that is, that this provision was merely a limitation upon the amount of the actual gain or loss that would otherwise have been taxable or deductible.

The case was argued by Solicitor General Beck for the Government and by Mr. Edward B. Burling for the executors.

McCaughn v. Ludington, Adv. Ops. 219, Sup. Ct. Rep. v. 45, p. 423, was a case arising upon similar facts and decided upon authority of the *Flannery* case. It was held that under the Revenue Act of 1918 the deductible loss on stock acquired before March 1, 1913, and sold in 1919, is the difference between the sale price and the cost price, and not the difference between the sale price and the value as of March 1, 1913.

Federal Income Tax,—Deductible Rentals

In *Duffy v. The Central Railroad Company of New Jersey, Adv. Ops.* 475, Sup. Ct. Rep. v. 45, p. 429, it was held that

Expenditures made for the improvement and addition to leased premises under the provisions of a long-term lease, are not rentals or other payments required to be made as a condition to the continued use of the property, and deductible under the Revenue Act of 1916.

Under the provisions of a 999 year lease, a railroad expended in one year over a million and a half dollars to acquire private rights in an old pier and to construct a new one, and it sought to deduct this amount as "rentals or other payments required to be made as a condition to the continued use or possession of the property." In rejecting the contention, Mr. Justice Sutherland said:

> The term "rentals," since there is nothing to indicate the contrary, must be taken in its usual and ordinary sense, that is, as implying a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property . . . and in that sense it does not include payments, uncertain both as to amount and time, made for the cost of improvements or even for taxes.

Federal Income Tax,—Depletion of Mines

In *Lynch v. Alworth-Stephens Company*, Adv. Ops. 295, Sup. Ct. Rep. v. 45, p. 274, the lessee of a mine who sub-leased his right to exploit the property

to another, sought to take advantage in his income tax return of that provision (of the Act of 1916) permitting a reasonable allowance for depletion from the gross income received from mines. The contention of the Commissioner of Internal Revenue was that the leases did not convey to the lessee the ore-bodies but only gave a contract right to use and occupy the premises and mine the ore; and that only the property of the owner of the fee suffered depletion. But the Supreme Court, in affirming a judgment for the taxpayer's representative, held that

The provision of the Federal Income Tax Law of 1916 providing for a reasonable allowance for the exhaustion of property resulting from its use, includes the exhaustion of the interest of one who leases a mine for exploitation and subleases the right to another for a royalty.

Federal Estate Tax,—Proceeds of Insurance Policies

Under the Revenue Act of 1919 the proceeds of insurance policies taken out by the insured on his own life are not subject to the estate tax where the right to such proceeds has vested in others before the passage of the Act.

Lewellyn v. Frick, Adv. Ops. 585, Sup. Ct. Rep. v. 45, p. 487.

Henry C. Frick died in December, 1919, leaving eleven life insurance policies payable to his wife or to his daughter. The policies had all been taken out before the passage of the Revenue Act of 1919. Under this statute the federal authorities imposed and collected a tax upon the transfer of the Frick estate, including the amount of these policies above $40,000. The executors brought suit to recover this tax, alleging that as the statute placed a personal liability upon the beneficiaries, the effect of this imposition was to tax Mrs. and Miss Frick upon their own property under guise of a transfer tax. Judgment for plaintiffs, entered by the District Court for the Western District of Pennsylvania, was affirmed by the Supreme Court.

Mr. Justice Holmes delivered the opinion of the Court, and said:

> We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle "that laws are not to be considered as applying to cases which arose before their passage" is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways.

The case was argued by Mr. James A. Fowler for the Collector and by Mr. George B. Gordon for the executors.

Federal Theatre Ticket Tax,—Embezzlement

In *United States v. Johnston,* Adv. Ops. 580, Sup. Ct. Rep. v. 45, p. 496, it was held that

Under the Revenue Act of 1919, requiring those receiving admission fees to pay over a tax to the Government, the person required to pay the tax is a debtor and not a bailee, and therefore cannot be punished for embezzlement if he fails to turn over the tax received.

The judgment of the Circuit Court of Appeals was reversed on another point, but the Court, by Mr. Justice Holmes, held that the trial court had properly dismissed an indictment for embezzlement drawn under the criminal code. He said:

> The money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show. We see no ground for requiring the ticket office of a theatre to create a separate fund by laying aside the amount of the tax on each ticket and to keep it apart, either in a strong box or as a separate deposit in a bank. Reports are required only once a month, Sections 802, 502, which does not look as if the Government were dealing with these people otherwise than with others answerable for a tax. Further argument seems unnecessary upon this point.

State Taxes on Property Transferred by Will

A State has no power to impose a tax on the transfer of tangible personalty having an actual situs in other States.

In computing the value of an estate for purposes of a transfer tax, a State may not include stocks in corporations of other States at their full value without deducting the transfer taxes paid to those States in respect of the same stocks.

In determining the value of an estate for the purpose of computing such a tax, a State need not deduct the estate tax paid to the United States.

Frick v. Pennsylvania, Adv. Ops. 692, Sup. Ct. Rep. v. 45, p. 603.

Among the litigation to which the administration of the estate of Henry C. Frick gave rise were these four cases, decided in one opinion, in which the executors and an interested legatee challenged as unconstitutional a Pennsylvania statute and its application to the Frick estate. The statute in question imposed a tax upon the transfer of property, by will or intestate laws, of one domiciled in Pennsylvania, whether the property were in that State or elsewhere. The taxing authorities accordingly required the executors to pay a tax on tangible personal property left by Mr. Frick and located in Massachusetts and New York, including the Frick Collection of art treasures valued at more than thirteen million dollars. When they failed to get relief in the State courts, the executors brought the cases on writs of error to the Supreme Court of the United States, where they contended that so far as the Pennsylvania statute attempted to tax the transfer of tangible personal property having an actual situs in States other than Pennsylvania it transcended the power of that State, and contravened the due process clause of the Fourteenth Amendment. Judgments were reversed.

Mr. Justice Van Devanter delivered the opinion of the Court. After stating the facts, he summed up the general law as revealed in decisions on cognate questions:

> These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; and, thirdly, that as respects tangible personal property having an actual situs in a particular State, the power to subject it to state taxation rests exclusively in that State, regardless of the domicile of the owner.

He then entered into an extensive review of relevant cases, leading him to the conclusion that Pennsylvania was without power to tax the transfer of personal property having an actual situs in other States. He said:

The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the State. But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personality having an actual situs in other States—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those States and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that State nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the States of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer.

He said further:

In support of the tax counsel for the State refer to statutes of New York and Massachusetts evidencing an election by those States to accept and give effect to the domiciliary law regulating the transfer of personal property of owners dying while domiciled in other States; and from this they contend that the transfer we are considering was brought under the jurisdiction of Pennsylvania and made taxable there. We think the contention is not sound. The statutes do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it. They declare what law shall apply and require the local courts to give effect to it. And it should be observed that here the property was administered in those courts and none of it was taken to the domiciliary State. Obviously the accepted domiciliary law could not in itself have any force or application outside that State. Only in virtue of its express or tacit adoption by the States of the situs could it have any force or application in them. Through its adoption by them it came to represent their will and this was the sole basis of its operation there.

The learned Justice next considered and held to be unconstitutional that provision of the Pennsylvania law requiring that in computing the value of the estate for the purpose of fixing the amount of the tax, stocks in corporations of other States should be included at their full value without any deduction for transfer taxes paid to those States in respect of the same stocks. He said in part:

The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those States the status of lienors in possession. As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicil and the actual situs of the stock certificate. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that State it was essential that the tax be paid. The executors paid it out of moneys forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power. So much of the value as was required to release the superior claim of the other States was quite beyond Pennsylvania's control. Thus the inclusion of the full value in the computation on which that State based its tax, without any deduction for the tax paid to the other States, was nothing short of applying that State's taxing power to what was not within its range.

But the third contention of the executors, that the provision that in computing the value of the estate there should be no deduction of the estate tax paid to the United States, was invalid, was not sustained. The learned Justice said that the power of the State and Federal Governments was concurrent, and therefore:

With this understanding of the power in virtue of which the two taxes are imposed, we are of opinion that neither the United States nor the State is under any constitutional obligation in determining the amount of its tax to make any deduction on account of the tax of the other. With both the matter of making such a deduction rests in legislative discretion. In their present statutes both direct that such a deduction be not made. It is not as if the tax of one, unless and until paid, presented an obstacle to the exertion of the power of the other. Here both had power to tax and both exercised it as of the same moment. Neither encroached on the sphere or power of the other. The estate out of which each required that its tax be paid is much more than ample for the payment of both taxes. No question of supremacy can arise in such a situation.

The cases were argued by Messrs. George Wharton Pepper and George B. Gordon for the executors, and by Mr. David A. Reed for the state authorities.

State Inheritance Tax

In *Stebbins et al. v. Riley*, Adv. Ops. 456, Sup. Ct. Rep. v. 45, p. 424, the point involved was like the third point considered in the *Frick* case, *supra*. The State courts sustained a California Inheritance Tax Act which provided that no deduction should be made for any inheritance tax or estate tax paid to the Government of the United States. But here the contention was that the statute denied the equal protection of the laws. The Court, by Mr. Justice Stone, held, however, that:

A state inheritance tax law may forbid the deduction of the Federal estate tax in fixing the amount of the state inheritance tax without denying the equal protection of the laws.

He said in part:

There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation. The incidents which attach to each, as we have observed, may be made the basis of classification. We can perceive no reason why both may not be made the basis of classification in a single taxing statute so that the amount of tax which the legatee shall pay may be made to depend both on the total net amount of the decedent's estate passing under the inheritance and testamentary laws of the state and the amount of the legacy to which the legatee succeeds under those laws. Such a classification is not, on its face, unreasonable.

Excise Tax,—Restraint Upon Interstate Commerce

In *Alpha Portland Cement Company v. Massachusetts*, Adv. Ops. 549, Sup. Ct. Rep. v. 45, p. 477, it was held that

A State may not impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by the proportion of capital shares attributed to transactions therein and the proportion of net income attributed to such transactions.

The contention of the State was that the tax imposed an excise tax on foreign corporations for the privilege of doing business in Massachusetts, and was unobjectionable to the Commerce Clause because it was measured solely by the property and net income fairly attributable to the business done within the State. But the Court, by Mr. Justice McReynolds, said:

The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Brothers Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the State. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden.

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COUNTING THE COST

If it were possible to devise an accounting system whereby the public could be informed in dollars and cents of the extremely high cost of poorly educated and equipped lawyers, of insufficient judicial salaries, and of anachronistic methods of procedure in the courts, there is small doubt that the movement for needed reforms would receive a powerful impetus. That the added cost due to these causes amounts to an immense sum every year is hardly disputed by anyone who has given the subject any thought. Unfortunately, the burden of it is diffused and obscured by a multitude of circumstances, and when the citizen is called on to support this or that proposed measure of reform,—for instance, proper salaries for our federal judiciary,—he is seldom aware of the broader aspects of the matter and least of all aware that he has a very direct financial interest in it.

But while an accurate method of cost accounting such as obtains in a business establishment is impossible, there are certain general considerations which carry their conclusions, as to the high cost of the factors above mentioned, to intelligent men quite as effectively as statistics could. They are considerations on which any business man would feel himself justified in acting in the conduct of his private affairs. Take the case of the insufficient compensation at present paid the federal judges. The board of directors of the National Manufacturers' Association, at a recent meeting, looked at this situation from a strictly business standpoint. They noted that the federal judges have had their salary raised only fifty per cent since 1891, while the general purchasing power of a dollar is only about twenty-seven per cent of what it was then; that in 1891 a United States District judge received about seven times the annual wage of a bricklayer, while at present he receives less than twice as much; that the wages of the farm hand have increased five hundred per cent and of bricklayers four hundred and fifty per cent, while his has increased only fifty per cent; that in the large cities at least, the judges cannot live in keeping with the dignity of their office, and can only live on their salaries at all by the closest economy; and that a number have resigned and many others are restive.

The manufacturers as hard headed business men realized that a continuance of this situation could hardly fail to bring more and more resignations, and to increase the difficulty of replacing the judges appointed when the salaries had sufficient purchasing power by men of the same high standard of ability. What is more, they saw plainly that frequent changes in judges would impair the efficiency of the bench, even where the ability of new appointees was equal to that of the old. For it requires long experience on the federal bench, with its widely varied work, to bring a judge to his best. They naturally concluded that the net result of this process must inevitably be an impairment of the ability of the bench to serve the public and, in consequence, a multitude of unwise legal decisions sure in the end to prove immeasurably more costly than adequate salaries. Hence they adopted the resolutions referred to in this issue in "Current Events". That the unfortunate process suggested has not gone on more rapidly and the untoward results been plainly evident in our administration of federal justice, is due to the self-sacrificing zeal and devotion of the great majority of the incumbents of the bench, who are carrying by means of personal deprivation a burden which the public should carry, and which to the public would be altogether insignificant.

Turning to the Bar, we have seldom seen the high cost of poorly trained and equipped lawyers set forth more effectively than in a brief statement contained in the report of the Committee on Legal Education and Admission to the Bar at the last meeting of the Missouri State Bar Association, held early in October. "Clients suffer from bad advice and poorly tried cases," the report states in dealing with the need of

higher educational standards. "The financial losses experienced by clients through blundering or dishonest legal services are incalculable. Furthermore, many a meritorious case is lost because of ignorance of the judge upon the bench, or of the lawyer at the bar. The lawyer and even the judge are responsible also for errors in the trials of cases that necessitate new trials, appeals, unnecessary costs and consequent delays, which in the end deny justice whatever the result, for justice delayed often means justice denied. Every citizen who has occasion to consult a lawyer or to resort to a court is entitled to the services of a well equipped lawyer and to the arbitrament of a well equipped judge. A license to practice law alone and of itself should be guarantee sufficient that the possessor is an honest man and a capable lawyer. . . .

"The public suffers because of inferior service at the hands of poorly equipped lawyers. The legal profession is peculiarly a public profession. From it come most of our chief executives, a large and influential portion of the legislative department, all of the judiciary department, and all of the attorneys general and prosecuting attorneys. In other words, it is usually the lawyer who is the draftsman of our laws, who is influential in the enactment of our laws, who executes our laws, and it is always the lawyer who interprets and judicially administers our laws, who advises our departments of government and who controls and directs our criminal processes. From the standpoint of the public, therefore, it is highly important that the members of the legal profession be men of thorough intellectual training and equipment."

When we come to the high cost of an inefficient administration of criminal justice, the evidences are a little more direct, although the estimates show a wide variation. According to an article by Chancellor Hadley of Washington University, St. Louis, in this issue, "the financial loss incident to crimes against property is variously estimated at from five to ten billions of dollars each year, according to whether the direct or the indirect losses are considered." He adds that he has examined carefully statistics which he gathered as chairman of the Committee of the American Law Institute from a majority of the states, and also those gathered by other committees and commissions, and he gives it as his carefully considered judgment, "that our system of apprehending and prosecuting those who commit major crimes is only about ten per cent efficient; that as to all offenders it is only about five per cent efficient; that of those apprehended and indicted for major offenses, it is only from twenty-five to thirty per cent efficient; and that of those actually tried for major offenses it is not over fifty per cent efficient. Those who have to deal with problems of business, finance, transportation, science or education, can perhaps better understand what these figures mean, if they would consider what would be the result in other enterprises or occupations if the percentage of efficiency ran from five to fifty per cent." Whether one is prepared to accept these figures as authoritative or not, there can be no question that there is enough evidence of inefficiency in the administration of our criminal laws to establish the fact that we are paying for a good deal more than we are getting.

At first blush, one might be tempted to assume that on such a showing the public would be very much in favor, through its representatives in legislatures, of reasonable plans for eliminating unnecessary costs, particularly when proposed by those who have had some acquaintance with the subject. Experience however shows that it takes a tremendous amount of effort and persuasion to get the legislatures to consent to what, aside from other aspects of the question, amounts to a plain saving in dollars and cents to the public. Encouraging responses have, however, been made in some states to appeals for proper salaries for judges, and the Committee of the American Bar Association on the Increase of Judicial Salaries believes that the attitude in Congress is now favorable to such a measure. As to the elimination of the high cost of poorly trained and equipped lawyers, it can only be said that most legislatures are far from being converted on this subject, although the intelligent and zealous efforts of the Bar Associations are unquestionably making progress.

When it comes to dealing with the high cost of inefficient criminal law administration, the general voice is loudly in favor of it; but when the question of attacking the particular factors which cause it is presented, there is always plenty of conservatism and obstruction. However, the subject is becoming better understood every day and improvement is sure to come.

CODIFICATION OF INTERNATIONAL LAW

Beginning of Modern Science of International Law—United States Supreme Court's Recognition of Law of Nations—Effect of the Great War—Committee of Experts Appointed by Council of League of Nations to Report on Subject—Codification Efforts in the Past—Difficulties in Way—"American International Law"*

By Hon. George W. Wickersham
Of the New York City Bar

THERE is much current discussion in the United States concerning the advisability of its adhesion to the Permanent Court of International Justice, as recommended to the Senate by Secretary Hughes and by Presidents Harding and Coolidge. The argument has been advanced by some of the opponents of the proposal that until the rules of law binding upon that tribunal shall have been formulated in writing and agreed upon by the principal nations, the United States cannot safely commit to its decision the determination of controversies in which it may be involved and which, conceivably, might be decided by the application of rules not recognized by our government as controlling principles of international law.

The objection is really immaterial because of two considerations. First, because unless the United States should elect to accept the compulsory jurisdiction of the Court, under Article 36 of the Statute, adhesion to the Protocol would involve it in no obligation to submit to its jurisdiction any controversy whatever. Secondly, because any nation which has not elected to accept the compulsory jurisdiction, might, if it chose, as a condition precedent to a submission of any given case, exact an agreement from the other party upon the principles of law which the Court should apply in its decision,—as was done in the arbitration of the so-called "Alabama Claims" against Great Britain before the Geneva tribunal in 1871. It might also be observed that during the one hundred and thirty-six years of our constitutional government the United States has submitted to arbitration upwards of 75 international controversies without any agreed rules of law to govern the arbitrators—save in a very few instances, leaving the decision in every other case to the uncontrolled discretion of a majority of the arbitrators, or to an umpire.

But the framers of the Protocol and Statute of the Permanent Court of International Justice took care to prescribe the law by which it should be governed in its decisions. Article 38 of the *Statute* provides that the Court shall apply:

"1. International conventions, whether general or particular, establishing rules expressly recognized in the contesting states;

"2. International custom, as evidence of a general practice accepted as law;

"3. The general principles of law recognized by civilized nations;

"4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

In addition, the Court was empowered to decide any case *ex aequo et bono*, if the parties should agree thereto.

The rules quoted are greatly in advance in definiteness over those established for the governance of the *International Prize Court*, contemplated by the convention adopted at the Second Hague Conference in 1907, by which if there were an applicable treaty, the Court was required to apply its provisions, and "in the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity."

The British government was unwilling to accept the jurisdiction of the Court with such a general undefined jurisdiction; negotiations ensued and a commission was appointed to prepare an agreement upon the rules relating to neutrality, contraband of war, search and seizure, and the like. The Commission reported the so-called "Declaration of London," which the British Parliament refused to ratify, and the Great War came on in 1914 before the laws of prize could be adjusted to the mutual satisfaction of the governments concerned.

Judge Max Huber, of Switzerland, in an address recently delivered on the occasion of taking his seat as President Judge of the Court, said:

> Public opinion is unable to appreciate the essential limitations of justice, in the strict sense of the term, in the realm of international law—a branch of law so imperfect, so incomplete, and so difficult to transform.

Indeed so imperfect is the conception of international law that a very respectable school of writers, including Hobbes, Pufendorf and Austin, has maintained that it is no law at all, because there is no super-sovereign political authority to enforce it against sovereign states. Dr. Fauchille points out that this is a misconception, based upon the fact that the one word "law" is employed in English to describe the different conceptions expressed in Latin by the two words *jus* and *lex*, and in French by *loi* and *droit*. Law, in the sense of *jus*, or *droit*, he truly says, antedates the judge, the organization of powers. "The Judge does not create law, he applies it." The brilliant and lamented scholar Baron Korff, in an interesting review of the results of modern researches into the history of ancient peoples, writing but a few months before his death, pointed out that it is not our civilization that created the institutions of international relations and law, but that every civilization possessed whole systems of it; that they are first a necessary product of social life, and secondly, that they had everywhere many traits in

*Address delivered at a joint session of the American Bar Association and the Michigan Bar Association, Detroit, September 2, 1925.

common not belonging exclusively, as was formerly supposed, to Europe, and that international law is a necessary consequence of any civilization. As to systemized international law, he says, we have several instances of real codification that would make a good example for modern times. Such were the different medieval codes of maritime law, the Tables of Amalfi, the *Consolato del Mare*, the Venetian Code of 1255, the Laws of Visby. His review of the authorities brought him to the conclusion that international law is as old as human civilization in general, and is socially a necessary and inevitable consequence of any civilization. The essence of the system, he concludes, is "the mutual recognition of obligations and the reciprocal observance of certan customs or usages."

Most writers on International Law affirm that in the modern sense of the term the Law of Nations began with the treatise "De Jure Belli ac Pacis," written and published by Hugo Grotius three hundred years ago. Certainly the systematic body of rules formulated by him became the basis of the subsequent modern development of international law. For as Grotius himself wrote:

> Many have undertaken to explain or summarize, either by commentaries or abridgements, the civil law of home and other nations, but few have dealt with that law which exists between several peoples or rulers of peoples, whether it be that derived from Nature herself, or instituted by Divine decrees, or created by custom or tacit agreement; and no one at all has so far discussed it generally and in systematic fashion, although it is of importance to mankind that this should be done.

To do that was the task undertaken by Grotius, and from the publication of his great work, it may truly be said, the modern science of international law began. Such progress was made during the next century and a half in the development and acceptance of a body of international jurisprudence that, in 1787, the framers of the Constitution of the United States formally recognized its existence by expressly empowering the National Congress to enact laws to define and punish offenses against the law of nations.

The Supreme Court of the United States, as early as 1796, in the case of Ware v. Hylton, recognized and applied this law of nations, which it considered to be of three kinds: general, conventional or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent, and is only obligatory on those who have adopted it. A few years later Chief Justice Marshall referred to the law of nations as

> The great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial States, throughout Europe and America. This law, he said, is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Thus began in the highest court of our country the exercise of that comity respecting the decisions of the courts of other nations and of international arbitral tribunals, upon questions of international law, which has given authoritative recognition to the universality of the law of nations and made its principles more readily ascertainable than when they were supposed to be found only in the conception of right and justice entertained by upright men and expressed in the writings of such great philosophers of the law as Grotius, Vattel, Pufendorf and Zouche.

In 1895, Mr. Justice Gray, delivering the majority opinion of the Supreme Court in a famous case, declared that International Law, in its widest and most comprehensive sense, is part of our American law and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination. He said:

> The most certain guide no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them.
>
> In doing this, the Courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.

A few years later (in January, 1900), the same court, in passing upon the legality of the seizure by American war vessels at the outbreak of hostilities with Spain, in 1898, of certain Spanish fishing craft, said:

> By an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine the court traced from its earliest history, in the writings of scholars, in decrees of English Kings, in treaties between Monarchs, in Ordinances of the French Kings, in Standing Orders of the British Admiralty, in the treaty of 1785 between the United States and Russia, and in the writings of Kent and Wheaton, Halleck, Wharton and Calvo, De Cussy, Orlolan, De Boeck and Fiore. Thus ancient usage among nations, ripening into fixed custom, was authoritatively recognized as the broad basis upon which international law must rest: a basis analogous to that of the Common law of England.

The Government of the United States, however, never has insisted on the conclusiveness upon other nations of the judgments of its own tribunals as to the rules of international law. On the contrary, as Mr. Root has pointed out, while

> No court in the world has greater power and independence and honor than the Supreme Court, established under the Constitution of the United States, yet our Government, by international agreement, has submitted to international tribunals many cases which could have been, and many cases which already had been, decided by that great court. (Citing the Peterhof, 5 Wall, The Dashing Wave, 5 Wall, The Georgia, 7 Wall, The Isabella Thompson, 3 Wall, The Pearl, 5 Wall, The Adela, 6 Wall).

The cases of The Hiawatha (2 Black), the Circassion (2 Wallace), The Springbock (6 Wallace), The Sir William Peel (5 Wallace), The Volant (5 Wallace), The Science (5 Wallace), "had all been decided by the Supreme Court and then were resubmitted to an international tribunal, which decided them adversely to the decisions of the Court, and the United States complied with the decisions of the arbitral tribunal."

If a great nation thus can accept as binding upon it the decisions of casual boards of arbitrators upon

great questions of international law, how much more sanctity must attach to the determinations of a permanent international court, erected upon the solemn treaty of fifty nations, composed of judges, with fixed tenure of office so chosen as to avoid any undue control by great or small powers, but representing all the civilized nations of the world alike. Such a court finds sanction for its decisions in the consent of the nations which brought it into being and their solemn agreement to abide by its decrees.

Lord Chancellor Haldane, discussing the question of the sanction of international law at the meeting of the American Bar Association held in Montreal in September, 1913, referred to the fact that law, properly so called, whether civil or criminal, "means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the State and are enforced by the sanction of compulsion. Law, however," he continued, "imports something more than this." He referred to other rules, enforceable by a different sanction, which also influence conduct. There is, he said, a more extensive system of guidance which regulates conduct and which differs from both Law and Conscience in its character and guidance.

There is grim irony in the circumstance that the learned Chancellor could find no word in the English language to express this ethical conception and was constrained to turn to the German language and German writers for the expression of the lofty thought he wishes to expound. *"Sittlichkeit"* was the word he chose; a word describing "a system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of a citizen which it is 'bad form' or 'not the thing' to disregard." "Indeed," he said, "regard for these obligations is frequently enjoined merely by the social penalty of being 'cut' or looked on askance." *"Sittlichkeit"* implies "custom and a habit of mind and action." Developing this thought, and finding that there was within the single state "the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient in the vast majority of the events of daily life to secure observance of general standards of conduct without any question of resort to force," the Lord Chancellor asked:

> Can nations form a group or community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a general will, and to make the binding power of these ideals a reliable sanction for their obligations to each other?

The answer he gave was hopeful but not confident. There did not yet exist between nations the same extent of common interest, of common purpose, of common tradition as among a single people. "And yet, the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognizable." The *"Sittlichkeit"* which can develop itself between the peoples of a loosely connected group, he thought, seemed to promise a sanction for international obligation which had not thitherto attracted attention in international law.

The attack upon civilization launched by the German military autocracy within a twelvemonth after Lord Haldane spoke apparently brought the whole structure of international law clattering in ruins to the ground.

Individual Germans might have had the conception of a lofty morality expressed by the word *Sittlichkeit*, and even to have contemplated the extension of that ethical principle to international action. But the German Imperial Government entertained no such ideal, and during the four years of war evidenced its contempt of "that decent respect to the opinions of mankind" which moved the fathers of the American nation to set forth in the famous Declaration of Independence the reasons which impelled them to separate themselves from the mother country.

Yet, Lord Cave, the present Lord High Chancellor of England, addressing the American Bar Association at St. Louis in 1920, testified that, in the acid test of war, "international law fared worse indeed than the optimists hoped, but better than the pessimists feared." In spite of failure here and treachery there, he said,

> the rules of international law had real value and authority. Our enemies, when they had a grievance appealed to those rules. We relied on them, time after time, and often with effect. Even countries which infringed the rules paid them the homage of an attempt to show that they were being observed.

For the future sanction of international law, the Lord Chancellor attached great value

> to the firm and consistent condemnation of enlightened public opinion of all infringements of that law. . . . World opinion has great weight, let it be frankly and clearly expressed and it will form a strong barrier against similar attempts in the future."

Mr. Root expressed the same thought when he said:

> For the great mass of mankind, laws established by civil society, are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life—the good opinon of others.

Out of the defiance of international law, the hideousness of wholesale destruction of mankind, the effort to substitute force for right, and the final failure of the German assault, came the more closely knit Society or League of Nations, and, obedient to the mandate of the Covenant of the League, the establishment of the Permanent Court of International Justice—the first tribunal ever erected in the history of mankind with jurisdiction over fully sovereign states, a jurisdiction resting firmly upon international agreement and respect for international law.

We need not give much thought to the question, which appears to concern so many critics, as to the force back of the decisions of the Permanent Court, necessary to make its decisions respected. Nor need resort be had to the imperfect analogy of the Supreme Court of the United States—the court of a great nation backed by all its executive power. The public opinion of the civilized world constraining nations which have agreed to submit their differences to the decision of the court is also the effective sanction for its decrees.

Coincidently with the creation of this tribunal, there arose an increased demand for a clearer expression, a more easily accessible form of the law which it must apply to the decision of those controversies between states which should be submitted for its judgment.

The body of eminent jurists who framed the protocol and statute of the Court in 1920 recommended to the Council and Assembly of the League the institution of international Conferences for the following purposes, viz: (1) To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war: (2) to formulate and agree upon the amendments and additions, if any, to the rules of international law

shown to be necessary or useful by the events of the war, and the changes in the conditions of international life and intercourse which have followed the war; (3) to endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore; (4) to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

The authorities of the League did not at first view these suggestions with favor. Even Lord Robert Cecil thought that a stage had not yet been reached in international relations at which it was desirable to attempt the codification of international law.

But sentiment in favor of taking a definite step towards the systematic restatement of the principles of tne law of nations continued to find expression and to grow in strength, so that in 1924 the Assembly of the League of Nations directed the Council to appoint a Committee of experts, not merely possessing the required qualifications but also as a body representing the main forms of civilization and the principal legal systems of the world, charged with the duty to prepare a provisional list of the subjects of international law, the regulation of which by international agreement would seem to be most desirable and realizable at the present moment, and after considering comments upon their work by the governments to which it should be communicated, to report to the Council of the League on the questions which are sufficiently ripe and on the procedure which might be followed, with a view to preparing eventually for conferences for their solution.

In selecting the members of this Committee, the Council of the League of Nations recognized that "the main forms of civilization and the principal legal systems of the world" include more than those of European and American States. Therefore, eminent lawyers from Japan, China and India were included in the number selected as well as from Europe and the Americas. This Committee has organized and undertaken the duties devolved upon it.

The substance of the resolution of the Assembly indicates a line of cleavage between the practical scheme of gradual or progressive codification by international agreements, and the idea of producing a comprehensive Code of International Law, similar in scope to the Code Napoleon, or the Codes of Substantive Law adopted in some of the American States, such as Louisiana, California, Georgia, and the two Dakotas.

The idea of a general codification of international law is not new.

Dean Pound, in his "Interpretation of Legal History," has pointed out the reaction against the legislative theory which arose when the reign of philosophy came to an end, and against which Savigny protested, upon the assumption that law is found, not made. He quotes Savigny's statement:

> Men longed for new codes, which by their completeness should secure a mechanically precise administration of justice, so that the judge relieved from the exercise of his own opinions, should be confined to bare literal application.

There is no doubt that much of the present insistence upon codifying international law is the result of just such longing, and the belief that law can be made so precise when put in the form of a book as to become mechanically certain and almost automatically applicable.

As Mr. Ernest Nys, in an illuminating article on the subject, reminds us, James Mill, the father of John Stuart Mill, prepared articles for the Encyclopedia Britannica between 1816 and 1823, dealing with the idea of a Code of International Law, proposing that the nations should appoint delegates who should elect persons to prepare a draft to be revised by the delegates and then referred to the various governments to receive their final sanction.

In 1827, Jeremy Bentham suggested the compilation of a body of international law by a congress of delegates from the civilized States, and in 1848 the American, Elihu Burritt, at Brussels, urged the calling of an international congress to prepare a well-defined code of international law.

David Dudley Field, a life-long advocate of the codification of laws, both domestic and international, in 1873 published a Code of International Law. In that year, too, was organized at Ghent the Institute of International Law, a permanent scientific body, which, as Mr. Nys says, quoting the words of its founder, "undertook the mission of paying particular attention to the progress of international law, of defining the principles thereof, and of assuring the practical efficacy thereof." At its first meeting, Signor Hangini, of the University of Rome, expressed the objects of the institute in this language:

> We hope to codify if not for all, at least for some, the rules applicable to international relations and to substitute, at least with regard to the majority of nations, a system of judgment in conformity with the law, in place of the blind chance of force, and for the useless spilling of human blood.

The Institute never has published a Code of International Law, but from year to year the scholars who compose its membership have produced studies upon various topics of importance in the domain of international law. Mr. Root has testified that when the first peace conference met at The Hague in 1897 the delegates "took the accomplished work of the Institute de droit international, which had been threshed out through the labors and discussions of the most learned international lawyers of Europe, including most of the technical advisers of the foreign offices of Europe, meeting in their private capacity, and embodied it in the convention of the First Hague Conference. It would have been impossible for The Hague Conference to do that work or one tithe of it if they had not had the material already provided."

In the year 1873 there also was organized "The Association for the Reform and Codification of the Law of Nations."

As the editors of the American Journal of International Law have pointed out,

> The title adopted by the Association at that time reflected the belief then widely entertained, in which Mr. Field's influence may also be recognized, that a Code of International Law must precede any general national resort to arbitration. Subsequent experience, they go on to say, has shown, however, that international arbitration is not dependent upon a general codification of international law and even when the ascertainment of the law to be applied is a prerequisite to arbitration, special rules governing the decision of the particular question submitted may be adopted by the treaty of arbitration; as, for example, in the Geneva arbitration under the Treaty of Washington between the United States and Great Britain and in the Venezuela Boundary Arbitration, under the Treaty of February 2, 1897, between Venezuela and Great Britain.

No serious attempt was made by the last mentioned Association to codify international law, and a few years after its organization its name was changed to "The International Law Association." Mr. Nys

says that, without attempting the purely scientific treatment of questions of international law, the Association has occupied itself in popularizing such questions by public discussion, and bringing to bear upon their solution the suggestions of practical men and formulating suggestions likely to have practical effect.

Partial codes of international law, dealing with particular subjects, from time to time have been formulated and to a certain extent agreed upon by nations.

The statement of the laws of war on land, prepared by Dr. Francis Lieber at the request of President Lincoln in 1863, and promulgated as the famous "General Order 100," is one example. The conventions adopted at The Hague in 1897 and 1907 are others. Since 1920 a large number of international agreements have been entered into; nearly nine hundred have been registered in the Secretariat of the League of Nations. Many of these agreements embody or create, in conventional form, rules of law binding upon the parties to them; rules which if finally accepted universally will become a part of the great body of international law.

The so-called Naval Disarmament Conference, held at Washington in 1921, agreed upon a number of treaties, some of which, notably that which made submarine warfare, as carried on by Germany during the World War, an offense against the law of nations punishable as piracy by any nation into whose hands an officer of the offending nation might fall, contemplate the extension of old and the making of new rules of conventional international law.

In 1915, Mr. Root pointed out to the American Society of International Law that "the process of codification, step by step, subject by subject, point by point, must begin with the intellectual labor of private individuals, and it must be completed by the acceptance of governments."

Answering the question whether international law should be codified, he said:

> If that means, should we undertake to put the law of nations into a single body which shall be the rule and guide for international relations, I think we must answer "No, that it is impossible at the present" . . . On the other hand, codification, considered not as a result, but as a process, seems to me plainly should be attempted and pressed forward and urged with all possible force.

In 1909, the American Society of International Law appointed a committee of eminent lawyers to prepare and report at the annual meeting in 1911 "a draft codification of those principles of justice which should govern the intercourse of nations in times of peace."

This Committee, in the following year, submitted a tentative report outlining the nature of treatment which should be followed, accompanied by a most interesting, succinct account of the history and status of codification.

In the course of this report, the Committee said:

> The difficulties in the way of municipal codification exist in an exaggerated form in international law. . . . A difficulty unknown to municipal codification meets us on the threshold of international codification; for the code is not the code of one nation, but of all nations if it be true to its definition and purpose. . . . When a municipal code has been promulgated, it is interpreted by the courts and applied to all controversies properly arising under it and submitted to the courts. . . .

An international code cannot be imposed. It must be either framed in common or accepted by the nations, and if disputes concerning its interpretation arise, there is no court of nations to which an appeal can be made and whose decision is binding.

> A court of nations may well presuppose a law of nations just as a code naturally or properly requires a court. This question, however, is not necessarily connected with codification, for there is a law of nations, even though it does not exist in codified form, and the objection of the absence of a court would apply with equal force to an international law in whatever form it may be.

Reference also was made to the difficulty in the matter of language. Then, referring to the work that had been done at international conferences, the Committee said:

> Each international convention is not only a step towards ultimate codification, but the material whereof the Code will be composed.

They also pointed out that the absence of an international court was not likely to furnish the opponents of codification with an argument for any great length of time, because of the creation of the International Court of Prize at the Second Hague Conference, and the probability that the Court of Arbitral Justice contemplated by the draft convention adopted at the Conference would no doubt be instituted at The Hague at no distant date, for the judicial determination of all controversies of a judicial nature arising between nations in times of peace. The world thus would have an international judiciary permanently composed and in session, for the interpretation and application of international law. This anticipation, thus expressed, has since been realized by the establishment of the Permanent Court of International Justice at The Hague, pursuant to the mandate of the Covenant of the League of Nations; a court which is so completely the fruition of American advocacy and of American effort that one can but marvel that there should exist any intelligent American opinion unfavorable to the adhesion of the United States Government to that Court, and still more that some of those who were most ardent advocates of just such a court should be found in the ranks of the opponents of it.

In closing a review of the history of the efforts at codification, the signers of the report of the Committee of the American Society of International Law said:

> Codification seems to be the order of the day, and it is probably safe to predict that in the course of a few years, international treaties and conventions will have codified a large portion of international law, even though no official and authoritative code be drawn up and promulgated by the nations.

But no further progress, in completing such a code of international law has been made by that committee. Papers on various subjects involved in the undertaking were read at the annual meetings in 1911 and 1912—useful material for the consideration of future Commissions or other bodies engaged in the work of Codification.

It is indicative of the difficulties of the task of preparing a code of international law, that this Committee of able and distinguished men, throughout the eleven years of its existence, produced no fuller or more definite result than the tentative report made to the meeting in 1910, to which reference has been made.

In April, 1919, the Executive Council of the American Society of International Law adopted a resolution urging upon the Peace Conference in Paris the adoption of a provision by which there should be called

> A general conference of the Powers to meet not less than two years nor more than five years after the signing of this convention for the purpose of reviewing the condition of international law and of agreeing upon and stat-

ing in authoritative form the principles and rules thereof. Thereafter regular conferences for that purpose shall be called and held at stated times.

After the meeting of the jurists who framed the Protocol and Statute of the Permanent Court of International Justice, the recommendations respecting the examination of the state of international law and a consideration of amendments or new rules properly required, which have been quoted above, were brought to the attention of the Executive Council of the American Society of International Law, and at the annual meeting in 1921 a committee known as the Committee for the Advancement of International Law was appointed for the purpose of considering the various recommendations made by the jurists who framed the Protocol and Statute, and the Committee on Codification was discharged. The subjects embraced in the recommendation of the jurists who framed the Protocol and Statute of the Permanent Court were divided among sub-committees of the new Committee for the Advancement of International Law. Each of these sub-committees submitted reports of more than passing interest.

The sub-committee appointed "to formulate and agree upon the *amendments and additions*, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war," reported that it had received a vast number of suggestions, out of which it selected six points which it thought should be considered, viz: (1) Responsibility for illegal acts of states; (2) Transfer of territory; (3) Free access to the sea; (4) Protection of prisoners of war; (5) Neutral prizes; (6) The status of government vessels.

The Sub-Committee, whose duty was the consideration of subjects *not now adequately regulated* by international law, but as to which the interests of international justice require that rules of law shall be *declared* and *accepted*, reported a list of thirty topics which had been suggested by the members of the Committee, and would be considered by the Sub-Committee as a whole, with a view to including them in the final report, if deemed advisable.

At the annual meetings of the Association held in 1922, 1923 and 1924, papers prepared by various scholars on different subjects embraced in this list were read and thus a very valuable body of suggestions and of memoranda was prepared and is ready for the use of those who may address themselves to the task of formulating agreements between nations upon the topics thus discussed. But no Code of International Law has yet been produced. I have referred at some length to these efforts because of the demonstration which they afford of the impracticability of attempting to strike off at a blow any general codification of the law of nations, and as indicating the difficulty of the task of even its *progressive* codification. Since its organization the Permanent Court of International Justice has decided three litigated causes and rendered ten advisory opinions. Every one of these matters involved the consideration of treaties, agreements, or rules of international law. Despite the provision of the statute that the Court is not bound by the rule of *Stare Decisis*, the natural and inevitable result of a body of judges dealing with principles of law in the adjudication of cases will be the growth and clarification of rules of law and the establishment of a body of decisions which, whether technically so or not, practically will be controlling in the decision of future cases.

Before closing this address, reference should be made to a movement which has been initiated by representatives of the Latin-American countries, and which, it is proposed, shall be taken up at the next meeting of the Pan-American Congress, to be held in Rio de Janeiro some months hence.

As far back as April, 1909, Senor Alejandro Alvarez, then Counselor of the Chilean Foreign Office, and who had taken an active part in the First Pan-American Scientific Congress, held in Santiago, Chile, in 1908, read a paper on *"American Internatoinal Law."* His thesis was that there were problems and conditions peculiar to American International Law which constitute a basis for a separate and distinct body of international law from that prevailing in Europe and elsewhere. He referred to three principles which Latin-American nations had declared and which had received the acceptance of the United States, viz:

> 1. No foreign state shall acquire any part of the territory of an American state, even with the acquiescence of that state;
> 2. Neither may any foreign state permanently occupy any portion of the territory of an American state, even by right of the conquest;
> 3. The states of the New World may not place themselves under the protectorate of any European state.

It is plain, he contended,

> that the countries of the New World have maintained and still maintain, as applicable to this hemisphere, certain rules and principles which were formerly not recognized, and some of which are not yet accepted, by the European states and consequently are not incorporated in modern international law.

He further maintained that because of peculiar conditions of political life and development, many of the international factors which have become pretty well defined and generalized in Europe and are given an important place in international law, have no application to the countries of the New World. Some of these peculiar conditions he mentioned were: "diversity in the form of government; the 'colonial' regime; immigration, etc."

He also mentioned problems growing out of questions of nationality, of civil war, of boundary controversies, the investment of capital, immigration, and the settlement of foreigners, as also embraced in these special matters. He said it was clear that while there were international problems and conditions purely European and having nothing to do with the New World, there were likewise numerous conditions, problems and factors of a distinctively American character. He recommended the classification and study of these subjects, saying:

> No useful purpose is subserved by the contention that all international rules must be universal throughout the community of nations. The solidarity of nations does not consist in their being guided always by the same principles but rather that they be guided by well defined principles which take account of the peculiar conditions of certain groups of states so that the latter may develop in harmony with their special needs.

At the 1915 annual meeting of the American Society of International Law, Dr. John Bassett Moore (now one of the judges of the Permanent Court of International Justice), in a paper on "The Relation of International Law in the American Republics," vigorously combated the idea of there being any difference between international law in the American hemisphere and international law as generally accepted. He pointed out that

> international law, in the sense in which the term is commonly understood, had its origin among the so-called Christian states of Europe. In consequence, all European states and all states inheriting European civilization are assumed to be bound by it. By Article VII, however, of the Treaty of Paris, of March 30, 1856, Turkey was

> expressly admitted 'to participate in the advantages of the public law and system of concert in Europe.' . . . In regard to the countries of America, there never was any question as to their position or their obligation, since all of them, as they now exist, were of European origin, having been at one time or another the colonies of European Powers. The first of them to become independent—the United States of America—acted from the outset upon the principle that it was subject to what was then generally known as the law of nations, but is now commonly called International Law.

That that was a part of the English common law. The same principle, he said, prevailed throughout the American republics. He referred to provisions in the Constitutions of the Argentine, Brazil, Columbia, the Dominican Republic, Honduras and Uruguay which acknowledge, expressly or by implication, the obligatory force of international law in matters to which it is properly applicable, and also showed that the same principle has often been consecrated in judicial and administrative decisions in Central and South American countries, and he reached the conclusion that the limits of diplomatic action are to be finally determined, not by local regulations, but by the generally accepted rules of international law.

The Standing Committee on the Study and Teaching of International Law and Related Subjects of the American Society of International Law, reporting in 1916, took pains to point out that

> In the teaching of international law, care should be exercised to distinguish *the accepted rules of international law* from *questions of international policy*. . . .
>
> This is particularly true, they said, of the teaching of international law in American institutions. There is a tendency to treat as rules of international law certain principles of American foreign policy. It is important that the line of division be clearly appreciated by the student. Courses in the foreign policy of the United States should therefore be distinctly separated from the courses in international law, and the principles of American foreign policy, when discussed in courses of international law, should always be tested by the rules which have received acceptance among civilized nations.

Professor Alvarez, in 1917, returned to the subject and argued that *international law must be Americanized*, "that is to say, American doctrines and points of view with respect to certain matters must be incorporated in it, which doctrines are distinguished by their liberal and democratic character, especially those relating to freedom of commerce, to diplomatic claims, etc."

As early as January, 1902, at an international conference of American republics, a convention was agreed to, providing for the appointment of a committee to draft a code of public international law and a code of private international law to govern the relations of American republics. This convention was not ratified, but at the Third Pan-American Conference, held in 1906, the question again was taken up and a convention adopted, which afterwards was ratified by some of the contracting parties, including the United States. This convention provided for the appointment of a commission, composed of a member of each of the ratifying parties, which was to meet in Rio de Janeiro. Delay in ratification of the treaty prevented anything from being done until after the World War. At the Fifth International Conference, held at Santiago, Chile, in the spring of 1923, Mr. Alejandro Alvarez presented to the Conference a report concerning projects of codification, which report and projects were adopted by the Conference as the basis of codification to be undertaken by a commission of representatives of the American republics to meet in Rio de Janeiro in 1925, in which each republic was to be represented by two jurists of its own choice. Pursuant to this resolution, the Governing Board of the Pan-American Union applied to the American Institute of International Law for aid, the Institute prepared and in April last submitted to the governing board of the Pan-American Union a series of projects or draft conventions, thirty in number, covering a wide range of subjects, dealing with what Mr. Hughes, the Secretary of State, as Chairman of the governing board of the Pan-American Union, denominated "The American International Law of Peace." This report is to be submitted to the Conference of Jurists to be held in Rio de Janeiro as above referred to. The report submits a series of proposed agreements in the form of the various conventions adopted at the Second Hague Peace Conference. In the Preamble, it is stated that

> international law originated and developed on the European continent and has thence been extended to all the nations of the world, but outside of Europe certain rules or principles have been modified in conformity with the special conditions prevailing in certain regions . . . ; that in view of the importance of the American republics, there should exist in future a closer cooperation between them and the nations of the world for the purpose of determining the principles and rules of universal international law; but it is incumbent on the American republics to determine among themselves alone the rules which should regulate simply their reciprocal relations. (Project No. 1.)

In the Second Project it is declared that, while by the act of incorporating themselves into the community of nations, the American republics recognize as applicable to themselves the international law in force in Europe, at the same time they always have maintained the right to reject or protest against the rules in force in Europe which were in contradiction to their independence and sovereignty, and to proclaim other principles or rules more in harmony with the new conditions of their existence and more favorable to their form of development; that matters pertaining especially to America should be regulated in our continent

> in conformity with the principles of universal international law, if that be possible, or by enlarging and developing those principles or creating new ones adapted to the special conditions existing on this continent.

By "American International Law," they say,

> is understood all of the institutions, principles, rules, doctrines, conventions, customs and practices which in the domain of international relations are proper to the republic of the New World.

The declaration that

> American international law thus instituted in no way tends to create an international system resulting in the separation of the republics of this hemisphere from the world concert,

does not wholly remove an apprehension that these projects, if adopted, may have that tendency, which was deprecated by the Committee of the American Society of International Law on the Study and Teaching of International Law and Related Subjects, in its report of 1916, *"to treat as rules of international law certain principles of American foreign policy."* The recommendations, as the Committee says, must be tested by the rules which have received acceptance among civilized nations.

The adoption by the republics of the American continent of any carefully expressed body of laws, accepted as applicable to them, should aid in establishing the relations between those nations upon a more secure footing of international peace and comity; yet it must be recognized that the creation of a separate code or body of law, framed with a view to the erection of a separate or distinct jurisprudence among the republics of America, from that applicable to all the civilized

nations of the earth, unless most carefully guarded, may tend to confusion in the principles of a law whose foundations lie in the common consent of all civilized Powers. Moreover, no body of agreements between American states to which the great self-governing Dominion of Canada is not a party can fairly claim to be regarded as general international law, and so long as European nations remain sovereign over various Central and South American countries, as well as of islands in the West Indies, it would seem impracticable as well as inexpedient to attempt to build up a code of international law to which they were strangers.

The limitations of this occasion will not permit of an analysis of all the provisions of these proposed agreements or codes of so-called "American International Law." The Secretary of State, in submitting them to the governing board of the Pan-American Union, said:

> They represent the labors of distinguished jurists of this hemisphere—and it is sufficient to say that they embrace a declaration of the rights and duties of nations, statements of the fundamental bases of international law and the fundamental rights of the American Republics, and the formulation of rules with respect to jurisdiction, international rights and duties and the pacific settlement of international disputes.

As such, they will command the respectful attention and the careful thought and consideration of representatives of governments throughout the world. When they shall finally have passed through the refining process of discussion among jurists, and consideration from the standpoint of the language, the culture and the scholarship of the divers American republics, as well as of those European nations which have possessions or other vital interests in the American hemisphere, they may be so moulded as to constitute a substantial and valuable contribution to the science of international law.

The law of our day, Judge Cardozo has told us, faces a twofold need:

> The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress and supply a principle of growth. The first need is deeply felt and widely acknowledged . . . The second, though less generally appreciated, is emerging year by year to fuller recognition.

Certainly in the field of international law, as well as in that of municipal law, both of these needs exist, and in the field of international law there is less discernible a philosophy which is to mediate between conflicting claims of stability and progress and supply a principle of growth, than in the field of municipal law. A restatement to bring certainty and order out of conflicting precedents of international law is everywhere recognized as desirable. Such a restatement can be produced gradually and by the labors of qualified scholars, tested by the knowledge of men who have had experience in the conduct of government. The philosophy which is to supply the principle of growth possibly may be found in the widening principles of democracy among nations, and in the enhanced recognition of the sovereignty of states, great and small alike. Mutual respect for each other's rights, and a willingness to submit international differences wherever possible of determination by the application of rules of law, to the decision of the International Court: These are two foundation stones for the attainment of that settled peace upon which the future of civilization depends. Making more certain and understood the principles of the law of nations is to lay the foundations upon which shall be reared this structure of international justice.

CONGRESSIONAL POWER TO RESTRICT SCOPE OF CHARGES OF FEDERAL JUDGES

By NORMAN FARRELL
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DURING its last session the United States Senate passed a bill declaring inter alia that it shall be "reversible error for the judge in any cause pending in any United States court to express his opinion as to the credibility of witnesses or the weight of the evidence."

An editorial in Law Notes for January, 1925, seemingly regards this provision as a desirable change, while an able article in the January number of the American Bar Association Journal, by Harry Eugene Kelley, Esq., of the Chicago Bar, treats it as "an impending calamity." Both of these learned writers discuss the subject, however, solely from the standpoint of policy or expediency.

In view of certain decisions of the Federal courts and the provisions of the Sixth and Seventh Amendments to the Constitution of the United States, the deeper and more fundamental question occurs, namely: would such an act be constitutional?

In Mattox vs. United States, 156 U. S. 237, it was said in construing the Sixth Amendment:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta.

In determining what is meant by "trial by jury" under the Constitution, since the practice varied in the several colonies, the United States courts must look to the common law of England rather than to the practice followed in any particular colony and such essentials of trial by jury as then prevailed in Great Britain at the time of the adoption of the Constitution were not abrogated by its adoption. (The Federalist, No. LXXXIII; Thompson vs. Utah, 170 U. S., 1; Maxwell vs. Dow, 176 U. S., 581.)

In Nudd vs. Burrows, 91 U. S. 426, the Court was called on to construe the Act of Congress of

June 1, 1872, known as the "Conformity Act," wherein it was provided "that the practice, pleadings and modes of proceedings in civil causes, other than equity and admiralty causes . . . shall conform as near as may be" to the same things existing at the time in the state wherein the Federal court was held. In that case, arising in Illinois, exception was taken to the manner in which the judge charged the jury as being counter to the Practice Act of Illinois which recited that a judge in his charge to the jury should instruct them only as to the law. The Supreme Court said the Illinois Act, as to the judge's charge, was not controlling. "The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form or mode of procedure within the meaning of those terms as found in the context. . . . There are certain powers inherent in the judicial office. How far the Legislative Department of the Government can impair them, or *dictate the manner of their exercise, are interesting questions,* but it is *unnecessary* in this case to consider them. Houston vs. Williams, 13 Cal. 24."

In Capital Traction Company vs. Hof, 174 U. S. 1, it was said:

> Trial by jury in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge and to enter judgment and issue execution, but it is a trial by a jury of twelve men in the presence and *under the superintendence of a judge* empowered to instruct them on the law and to *advise them on the facts.*

And the same opinion proceeds to quote from Lord Hale's History of the Common Law, ch. 12; "touching trial by jury," as follows:

> Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law emerging upon the evidence, to direct them; and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them in his opinion even in matters of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges.

In Re Peterson, 253 U. S. 300, Justice Brandeis, speaking for the court, observed:

> The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be relaxed. . . . The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed and that the ultimate determination of issues of fact by the jury be not interfered with.

In McKeon vs. Central Stamping Company, 264 Fed. 385, the Circuit Court of Appeals for the Third Circuit, discussing the meaning of the Seventh Amendment that "the right of trial by jury *shall be preserved,*" observed:

> What do these few simple words used in the Constitution "the right of trial by jury shall be preserved," mean? What did these words mean to those who used them when they were written into the Constitution? There was something that was then preserved, for preservation implies the continuance of what previously existed. We are not dealing with an indefinite, but a very definite, concrete, well understood thing, that at that time had such a recognized meaning that it was described not as "a right of trial by jury," not as some or any right of trial by jury, but as "the right of trial by jury."

After quoting from the Declaration of Independence the opinion continues:

> From this it is quite evident historically that the trial by jury of which King George had deprived us was the trial by jury to which as British colonists and subjects we were then entitled. . . . And the omission to preserve it also in civil cases was made one of the strong arguments against the adoption of the Constitution; indeed its adoption was only secured on the implied understanding that it, with other omitted provisions, would be embodied in those amendments which were at once passed.
>
> Addressing ourselves, then, to the question of what was this trial by jury as then fixed by the common law of Great Britain, it will be seen that the jury of the common law of England consisted of twelve men; that it heard all the evidence pertinent to the issue raised by the pleadings; it returned a single verdict, and upon such verdict judgment was entered, and if a new trial is granted it is a new trial of the whole case.

In Lowe vs. Kansas, 163 U. S. 85, the Court said:

> Whether the mode of proceeding, prescribed by this statute, and followed by this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases.

In Hughey vs. Sullivan (C. C.), 80 Fed. 72, it was said:

> While the (State) Legislature may prescribe any rule of property or any rule of pleading or any rule of practice or any form of procedure, it cannot invade the domain of judgment of the jury or its presiding judge and direct what that judgment shall be in the discharge of the respective or joint functions of either. They must remain under the Federal Constitution, at least, to the government of the common law. It may be inconvenient and sometimes oppressive that this restriction exists . . . but wisely or unwisely it has fixed the common law trial by jury as to which we are bound and only that.

In Re Peterson, 253 U. S. 300, Judge Brandeis, heretofore quoted from, in speaking for the court, said:

> The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed and that the ultimate determination of issues of facts be not interfered with. . . . New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.

This was said in a case at law, where an auditor was appointed to examine long accounts, with many disputed items, report thereon, and thus simplify the issues for the jury. This was held proper.

In this case Judge Brandeis made the above statement of what the Seventh Amendment meant largely on the authority of an article, referred to in the opinion, entitled: "Trial by Jury and the Reform of Civil Procedure," by Prof. A. W. Scott, 31 Harvard Law Review 669.

Prof. Scott, in this article, said:

> At common law it was clearly proper for the judge not merely to state the law and to sum up the evidence, but also to express an opinion on the questions of fact in issue as long as he leaves to the jury the ultimate determination of the issue. . . . Since the judge had this power at common law, he is not deprived of it merely because the right of trial by jury is guaranteed by the Constitution. But in many of the States this power has been expressly taken away by constitutional or statutory provisions. It may well be questioned how far the legislature can constitutionally curtail in this way the power of the judge. "Trial by jury" in such form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern and much less to be respected. Thayer, Evidence, 188 note.

In view of the doubt of this legislative power of restriction on the judicial function expressed in Nudd vs. Burrows, 91 U. S. 426, supported by the doubts of Professors Scott and Thayer, it is suggested that the proposed Act of Congress might well be said to be an invasion of the right which was "preserved" by the Constitution.

ABATEMENT OF LIQUOR NUISANCES UNDER THE VOLSTEAD ACT

By Eusebio Chacon
Deputy District Attorney, Trinidad, Colorado

WHILE in Kansas City, during the first week of May in the current year, the writer of this article glanced casually at one of the morning papers of that city, and his attention was arrested by the following item of news:

Speeds End to "Speak Easies".

New York Federal Judge padlocks nineteen in 70 minutes.

(By Associated Press.)

New York, May 8.——Federal Judge Knox, in padlock court, today disposed of twenty-one prohibition proceedings in an hour and ten minutes, padlocking nineteen places and issuing two permanent injunctions. "This is a good deal better than spending two days trying a bartender," he said.

This item interested us, because we had just "padlocked" several notorious road-houses in our home county, by proceedings, in the state courts, under Sections 22 and 23, Title II, of the National Prohibition Act, at the suggestion of the Federal Prohibition Director of our state.

A month thereafter, in the June issue of the American Bar Association Journal, there appeared a very able article from the pen of Mr. James Monroe Olmstead, of the Boston Bar, in which he suggests a line of inquiry, by which it might be possible to attack the constitutionality of these Sections. The article is entitled "Padlock Injunctions," and it gave us no small concern, because it is ably written, and shows thorough research. In fact, it is such an attack as requires very skilful handling to neutralize it. We set ourselves, however, to the task of analyzing it carefully, and we now have the satisfaction, in this brief study, of giving our conclusions, in opposition to Mr. Olmstead's views. In what follows, we will examine some of those authorities that uphold our contention. In these cases, the objections raised were, either that defendants had been deprived of property without due process of law, or that they were denied the right of trial by jury, or both; and in one instance we recall, in addition to these objections, the defendants claimed that the statute violated the double jeopardy provision.

In the first place, let us make bold to say that, we think, the learned writer starts from a false premise in assuming that Sections 22 and 23 attempt to substitute, for the usual criminal proceeding, an equitable one. The Act, in our opinion, does nothing of the kind. Reading Section 29, (which provides the penalties), together with Section 3, and the subsequent Sections dealing with the commerce and traffic in permissible liquors, we see at once that the government, foreseeing what rough sailing the Prohibition Law would have in certain quarters, put an extra set of teeth in the statute. When our attention is focused on this feature, we find the extra teeth very visible in Section 21, which contains two subjects, viz.: (1)—a public nuisance arising from the keeping of a place to violate the law, and (2)—the maintenance of said public nuisance as a criminal offense. Sections 22 and 23 simply provide the details of the procedure to abate the nuisance contained in (1), leaving subject (2) to be dealt with in the ordinary courts of law.

The cases of Mugler v. Kansas (123 U. S. 263, 8 Sup. Ct. 273, 31 L. Ed. 205) and Eilenbecker v. U. S. (134 U. S. 31, 10 Sup. Ct. 424), said by Mr. Olmstead to be responsible for what he terms a novel doctrine—and it is not novel at all—will be presently noticed. We advisedly say that the doctrine is not novel: It is, as found in the Volstead Act, the application of an ancient principle to new conditions, arising from modern requirements and modern legislation. In their last analyses, these cases simply mean, that it is perfectly lawful for a state to adopt, in the suppression of public nuisances, so declared to be by statute, those same methods and remedies that were in use to suppress public nuisances that were such at common law. No one can find fault with this doctrine. No one will seriously question the authority of the legislature to declare certain things, used in a certain unlawful way, by certain individuals who persist in breaking the law, to be public nuisances, and to provide the machinery for their suppression in equity.

We have no quarrel with the doctrine, that equity has no jurisdiction to enjoin the commission of a crime, but that resort must be had to the criminal courts, which possess ample power to punish and prevent it. But, where there is legislation to enjoin a public nuisance, which at the same time is declared to be a crime, the best considered cases uphold this jurisdiction. And even Missouri v. Uhric (14 Mo. App. 413) becomes consistent with this view when read in the light of later Missouri cases. See State ex rel v. Canty et al. (207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (n. s.) 747).

As to the case of Carleton v. Rugg (149 Mass. 550, 5 L. R. A., 195), which upheld the jurisdiction of the court of equity to suppress a liquor nuisance, of the kind we are here considering, and under legislation of the same class, we find that the courts of Massachusetts have seen no reason to modify their views, in more than thirty years; and so we learn of them speaking to the same effect in Chase v. Proprietors Revere House (232 Mass. 88, 122 N. E. 162).

Mugler v. Kansas was a decision disposing of three distinct cases, wherein the same issues of constitutional law were involved. In the first two cases, Mugler had been criminally charged, in the state courts, with having sold, and having manufactured for sale, intoxicating liquors, contrary to the State statute. He was convicted; his convictions were affirmed by the State Supreme court (29 Kas. 252), and he brought the cases, by writ of error, to the Supreme Court of the United States. The third case, that of State ex rel, Tufts v. Ziebold and Hagelin, was a civil proceeding commenced in the state courts, to abate an alleged nuisance maintained by the defendants, in violation of the same state pro-

hibitory law. The defendants attempted to remove the case, by petition, to the Circuit Court of the United States, but their petition was denied. They then filed a transcript of the record in the United States Circuit Court, and there the State filed a plea in abatement, which was overruled, and the case held for trial. An answer was filed, and, upon issue joined, after several amendments and stipulations, the case was submitted. Upon final hearing, the bill of the state was dismissed, and the relief denied. The State then brought up the case by appeal to the Supreme Court of the United States. These three cases, involving the same issues on constitutional law, were disposed of by the Supreme Court as follows: It sustained the two convictions of Mugler, and reversed the Ziebold case, remanding it to the lower Court to enter a decree accordingly, and in doing so it upheld the constitutionality of the law. It will be noted that the Kansas statute, a pioneer in this class of legislation, was almost identical in language with the provisions of the Volstead Act, so far as it related to the injunction proceedings and to the nuisance to be abated. In disposing of the objections to it, the Supreme Court thus expressed itself, at page 302, 8 Sup. Ct.:

> The state having authority to prohibit the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

Eilenbecker et al., v. District Court, Plymouth County (134 U. S. 31, 10 Sup. Ct. 424) was a review, by writ of error, in the Supreme Court of the United States, of the judgment of the Iowa courts (69 Ia. 240, 28 N. W. 551), in certain contempt proceedings for violating an injunction, under the state statute, very similar to the Kansas statute and to the Volstead Act. The same questions as to constitutionality were there raised and examined, and the same conclusions reached. The Court said (we quote from page 427, 10 Sup. Ct.):

> If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond, that, so far as at present advised, it appears to us that all the powers of the court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the constitution of the United States to the form of proceedings or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime, after it has been committed.

U. S. v. Cohen (268 Fed. 420) decided in October, 1920 (U. S. Dist. Ct., E. D. Missouri), was a case in which the United States filed its bill, under Sections 22 and 23, Title II, National Prohibition Act, to enjoin the defendant Cohen from maintaining a public nuisance on his premises, in violation of said Act. While the court, in that case, denied the prayer of the complaint and dismissed the bill, because it did not state facts sufficient to warrant the relief, and because of the insufficiency of the supporting affidavits, yet it announced that the statute was constitutional. It further stated that, upon amendment of the bill so as to state a cause of action, backed by the proper and sufficient affidavits and proofs, a perpetual injunction was grantable, upon final hearing, under Sections 22 and 23, of the Volstead Act.

In the case of U. S. v. Lot 29, Block 16, Highland Place, City of Omaha, reported in 296 Fed. 729, the United States District Court of the Omaha Division for the District of Nebraska, positively and squarely states that the law is unconstitutional. But this case, when closely examined, does not present such insurmountable difficulties as at first glance might appear. The decision was handed down in March, 1924—nearly two years after the decision in Lewinsohn v. U. S. (C. C. A. 7th Cir., 278 Fed. 421) had been announced, sustaining the constitutionality of the law. It can hardly be possible, therefore, that the Nebraska Court was not aware of this case and its import. The same may be said of U. S. v. Reinsenweber et al. (C. C. A. 2nd. Cir., 288 Fed. 520) decided in January, 1923, and which likewise upheld the validity of that law.

But we will advert to these federal cases presently. As to the Nebraska case, we notice in it a total absence of citation to authorities in its seven pages of printed matter. In fact, the only case mentioned at all, is Mugler v. Kansas, supra, and that, for the sole purpose of stating that, while the Supreme Court of the United States sustained, in that case, the power of the Kansas court to abate the existing nuisance, yet it was in no wise concerned in, nor was there drawn before it, any such question as was presented in the Nebraska case. By this the learned court evidently meant, as we gather from previous paragraphs, that, because of the difference between the State and National governments, the former being governments of general reserved powers, and the latter a government of delegated powers, the rules of construction could not be the same in the examination of laws of this character. In other words, that, although the power of the sovereign state to provide a proceeding for the suppression of intoxicating liquors by means of injunctions and equity courts should be clear, it would not follow that the same course was open, under the constitution, to the federal government.

It is true, and will hardly be denied, that the National government is one of delegated powers only, limited and circumscribed in their scope. But, it is likewise true, that when acting within the orbit of those powers, Congress adopts a statute substantially as it exists in the legislation of a state, it adopts also the known and settled construction given to it by the courts of that state. (Willis v. Eastern Trust and Banking Co., 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752. Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. Strasburger v. Dodge, 12 App. D. C. 37.)

This being the case as to a state court decision, how can it be said consistently, that, when Congress adopts a state statute, it will reject, and that the courts can reject, the construction already put upon that very statute by the Federal Supreme Court?

The Eighteenth Amendment, passed soon after the great war, reads as follows:

> Art. XVIII.—1.—After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.—2.—The congress and

the several states shall have concurrent power to enforce this article by appropriate legislation.—3.— . . .

Now, what can the second paragraph of this Eighteenth Amendment mean? When it empowers congress to enact the appropriate legislation to enforce it, does not the constitution, as so amended, *delegate to it one more power,* that of creating the machinery to "enforce" it, as it best sees fit, to the same extent as a state might do, in the exercise of its police powers? Has congress, then, exceeded its constitutional authority in the enactment of Sections 21, 22, 23 and 24, Title II, National Prohibition Act? The literal interpretation of the wording of the Amendment itself should be sufficient; and if this is not enough, that answer is conclusively contained in the opinion of Mr. Justice Rogers, in U. S. v. Reisenweber et al. (C. C. A. 2nd. Cir., 288 Fed. 520, 524) to which we will more particularly refer later on.

In January, 1922, almost two years before the Nebraska case was decided, the United States Circuit Court of Appeals, Seventh Circuit, handed down its decision in the case of Lewinsohn v. U. S. (C. C. A. 7th Cir., 278 Fed. 421). That case came up from the Court for the Eastern Division, Northern District of Illinois. An injunction had there been prayer for and granted, under the very Sections we are now examining. The defendant violated the injunction, and was cited for contempt and punished. He took exceptions, and carried the case to the Circuit Court of Appeals. Passing on the constitutionality of these Sections, the Court has the following to say: (We quote from pages 427-8, 278 Fed.)

> The constitutionality of these three sections, 21, 22, and 24, is attacked on the ground that they violate, (a)—the due process of law clause, (b)—the provisions for trial by jury, and, (c)—the double jeopardy provision of the constitution. While conceding that the question of the constitutionality of the Volstead Act generally is now closed,—(National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946), and that the provision defining intoxicating liquors is constitutional, (Ruppert v. Caffey, 251 U. S. 254, 40 Sup. Ct. 141, 64 L. Ed. 260), defendant relies upon the language of Justice McReynolds in the first cited case, where he stated: "It is impossible . . . to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider those questions when they arrive." Subsequently in Street v. Lincoln Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151, 10 L. R. A 1548,—the court seems to have given added finality to its determination that the Volstead Act is constitutional. Section 33 of the Act alone was here construed, however, and we have approached this question upon the assumption that the sections under consideration were not included in any of the Supreme Court decisions referred to, and, as to them, the question is open. The attack upon these sections, based upon the ground that property was being taken without due process of law, must fail, we think, because of the decision in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, where the court said: "Equally untenable is the proposition that the proceedings for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. . . ."

The objection that the defendant had been deprived of his right of trial by jury, was briefly dismissed by the Court saying, that, the question was then closed by at least two Supreme Court decisions, namely, Eilenbecker v. U. S., *supra,* and In re Chapman (166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154). And lastly, as to the claim of double jeopardy, it was declared, that also must be denied on the strength of In re Debs (158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092); In re Chapman, *supra;* Stead v. Fortner (255 Ill. 468, 99 N. E. 680); Mobile v. Louisville & Nashville Railroad Co. (84 Ala. 155, 4. So. 106, 5 Am. St. Rep. 342.)

We believe that much of the misunderstanding that has taken place in the consideration of this class of legislation, comes from failure to distinguish between property that has become a public nuisance, and property that is used and employed for lawful purposes. The first is an outlaw, having no claim to privileges under the bill of rights; the latter safely comes within the circle of its provisions. But even then, the sovereign power, wishing to have the question of the public nuisance judicially determined in an orderly way, sends it to equity, to be dealt with there in the ways known to equity alone.

And we are mistaken in the temper of our judiciary, if we think that, in the exercise of their chancery powers, they are going, with malice aforethought, to do some harm or injustice to any person. The peaceful and law-abiding citizen has nothing to fear at their hands: It is the transgressor, and he alone, who must feel the scalpel, when it is applied to the removal of a carbuncle in the social organism. We know that our prosecuting officers, as a rule, have such high conception of the ethics of their calling and position that they will not bring a case into court unless it has great merit. We know also, that, if they were to be somewhat careless in this regard, the Chancellor himself, scanning the bill and affidavits, would throw it out of court *in limine,* if it did not state sufficient cause. And in this, they but follow that rule of action, in the premises, laid down for them so graphically by the Supreme Court of the United States in Mugler v. Kansas, *supra,* (8 Sup. Ct. 303), where it says:

> The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted, except upon clear and satisfactory evidence that it exists.

Another ground for misunderstanding, we think, comes from the fact that many believe a legislative body has no power to declare that thing to be a common nuisance by statute, which was not such a common nuisance *per se,* at common law. But even this contention is now closed, by the words of the Court, immediately following the above quotation, in the same case:

> Here (says the court, 8 Sup. Ct. 303, *supra*), the fact to be ascertained was not whether a place kept and maintained for the purposes forbidden by the statute, was *per se,* a nuisance, that fact being conclusively determined by the statute itself, but whether the place in question was so kept and maintained.

And to the same effect and purpose are the words of the court in U. S. v. Reisenweber (C. C. A., 2nd. Cir., 288 Fed. 520) where, at page 524, it says:

> It is, however, within the province of the legislative body to prescribe what shall constitute a nuisance, and it may make that a nuisance which was not one at common law. See Moses v. U. S., 16 App. D. C. 428, 50 L. R. A. 532; State v. Beardsley, 108 Ia. 396, 79 N. W. 138; State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402. And

inasmuch as the Eighteenth Amendment makes the traffic in intoxicating liquors for beverage purposes unlawful, we do not doubt the constitutional power of Congress to enact that any place "where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance", as provided by law.

In a very recent case, that of Penapolis et al. v. U. S. (C. C. A., 5th Cir., 3 Fed. 2d. 722), the United States had filed a bill in chancery, in the District Court for the Eastern District of Louisiana, praying the suppression of a common liquor nuisance, under the provisions of the Volstead Act. From a decree granting the prayer, and denying to defendants the right to occupy or use the premises in question, for a period of one year, they appealed to the Circuit Court of Appeals. They assigned, among other errors, that Section 22 was unconstitutional, because it denied them the right of trial by jury. To this contention the court ruled adversely, saying, at page 723, of the reported case:

> The objection that section 22 is unconstitutional because it denies the right of trial by jury, and authorizes in the first instance a suit in equity to abate a nuisance, is not well founded. The same objection was made in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L.Ed. 205, to a like statute adopted by the state of Kansas. In that case it was said: "As to the objections that the statute makes no provision for a jury trial in cases like this, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance, etc. . . ."
>
> The statute having declared the premises where intoxicating liquor is kept to be a common nuisance, the government had the right to abate that nuisance by a suit in equity, notwithstanding it at the same time had the further right to resort to criminal prosecutions. It may resort to either method, or both, at its discretion. In Re Debs, 158, U. S. 564, 15 Sup. Ct. 900, 39 L.Ed. 1092.

In the case of U. S. v. Schwartz (1 Fed. 2d., 718) decided November, 1924, the United States had prayed for an injunction, in the United States District Court for the District of Massachusetts, against one Benjamin Schwartz and Abraham Melamed. Defendants were tenant and landlord, respectively. Schwartz had been conducting a grocery store on the premises leased from Melamed, and there he had been selling "moonshine," that had been proven to contain 40-odd per cent of alcohol. The bill, as to Melamed, was dismissed, upon finding that he was an innocent party, and that he did not know anything about the unlawful acts of his tenant. As to Schwartz, however, an injunction was granted, and, in upholding the constitutionality of the law, the court, at page 722, of said report, had this to say:

> On the other hand, this court cannot adopt the contention of defendant's counsel that the statute is unconstitutional. Reliance for this view is placed upon the opinion of Judge Woodrough in the United States v. Lot 29, Block 16, Highland Place, City of Omaha, 296 Fed. 729, filed March 7, 1924, in the Omaha Division of the District Court for the District of Nebraska. The statute does not seem to this court to be open to the objections that Judge Woodrough found insuperable. The fact that Congress provided a double remedy against such nuisances, making them criminal misdemeanors and, if continuous and recurrent, subject to abatement by equity proceedings, does not seem to involve any unconstitutional criminal jurisdiction by a court of equity. Nuisances are not necessarily crimes. Congress might, if it had seen fit, have provided no criminal remedy whatever.

To the complaint that this artificial crime, this *malum prohibitum* is made to suffer the rigors of the law more severely than heinous crimes, we reply by pointing to the brood of other evils that travel in its train. This thing is the ally of the underworld in its eternal conflict with society. Thieves and gamblers, vendors of drugs that sap the life of our America—these thrive to perfection in the atmosphere of this artificial crime. And, last but not least, it is the staff of life for those cheap cafés, way-side inns, and other nondescripts, where seasoned veterans in vice unleash their passions with pagan abandon. And these are but some, samples as it were, of the many fruits of this *malum prohibitum*.

And when conditions come to such a pass, no self-respecting government can let them go unchallenged, but will promptly meet them with the mailed fist. Transgressors will then learn, and the sooner the better, that our government is not a Gulliverian giant tied on the strand of Lilliput. And, from the authorities just examined, and in the very nature of things, we see that the federal government, in this matter, is not so helpless after all. It is aroused and stripped for action, with plenty of power to keep the evil well in hand.

But here we must end. This article, already beyond the limits that we originally intended for it, is now before the readers of the JOURNAL, for what it is worth. We do not harbor the delusion that we have advanced all that might be said on this important subject; but enough has been brought forward, we hope, to show the reasonableness and merits of our contention. In closing, let us assure those who do not think as we do, that our remarks have not been prompted by any presumption on our part. The question here examined is one of vital public interest, wherein men of fair minds and honest purposes may differ. But intelligent discussion of these questions will, in the end, bring about the right solution, and that is what all of us desire.

Fighting the Crime Wave

Among the main items on the program of the Chicago Bar Association for the year is co-operation with the courts in dealing with the crime situation in Chicago. Under the presidency of Mr. Russell Whitman particular attention is being paid to this important matter. Recently there was a conference between Chief Justice Lynch and representatives of the local bar association at which the conclusion was reached that five additional judges should be assigned at once to the criminal court. The object of course is to deal more promptly with the numerous cases arising and thus give the crime world an effective demonstration of the inconveniences of a justice a little speedier than appears to have been possible in the past. Chief Justice Lynch also announced after the conference that the local association, acting through effective committees, will cooperate systematically with the judiciary in improving the administration of justice. That this cooperation by the association is no mere figure of speech is shown conclusively by its action some time ago in offering the services of a number of experienced men to aid in prosecutions. The association now has 3,850 members.

WORK OF THE SECTIONS AT DETROIT MEETING

Section of Public Utility Law

AT the meeting of the Section of Public Utility Law, held in connection with the American Bar Association meeting, at Detroit, on August 31 and September 1, 1925, the attendance was larger and the interest greater than at any previous meeting of the Section. It was notable in the attendance of representatives of Commissions.

A very interesting address by Kenneth Burgess, Esq., General Solicitor of the Chicago, Burlington & Quincy Railroad Company, on the returns allowed to railroads under the present condition of federal legislation, provoked a very animated and interesting discussion at the first session, Monday afternoon, August 31. This was followed by an address on "No Par Value Stock," by the Hon. John H. Roemer, of Chicago, who, in connection with his address, presented the paper of F. B. Odlum, Esq., of New York, who, by absence from the country, was prevented from doing it in person. It was discussed and some of the objections that might be voiced to it and raised against it were suggested by Hon. Thorne A. Browne, Chairman of the State Railway Commission of Nebraska. The discussion of all of these matters was very interesting, and continued into the late afternoon.

On Tuesday morning, Eustace Seligman, Esq., of New York, discussed some of the problems arising from the wide dispersion now and lately taking place of utility stock among customers and employees, under the subject, "The Broader Legal Aspect of Customer Stock Ownership of Public Utilities." And then an address was made by Judge William D. B. Ainey, Chairman of the Public Service Commission of Pennsylvania, and Chairman of the National Association of Railway and Utility Commissioners, who took up the various problems, both intrastate and interstate, confronting utilities and commissions at the present time, not covered by the jurisdiction of the Interstate Commerce Commission. The discussion which followed this most admirable address, as well as the address itself, all seemed to point to the necessity of Congress designating the State Commissions as Federal agencies to regulate bus transportation and power transmission in so far as they affected interstate concerns. This was followed by the Hon. William W. Potter, of the Public Utilities Commission of Michigan, on "Going Value." There was not time enough to afford all the discussion that was desired on these matters, because of the great interest manifested.

Tuesday evening the Section met informally around dining tables spread in the hall, for general discussions, after listening to an address by the Hon. Samuel D. Pepper, also of the Michigan Commission, on "The Motor Bus in Our Transportation System." He amplified in this particular what Judge Ainey had referred to. A discussion on various topics followed by several members. This informal dinner, as the concluding session, was an innovation, but the success of it was so marked that doubtless it will be repeated and probably will become the regular practice.

The importance of the matters with which the Section is more intimately connected and in which its members are interested, is so great that it can readily be understood why the attendance is increasing. The demand made for copies of the papers presented is too great to be met.

A large number of new members were enrolled. The Section has no dues at all, and the only thing necessary to become enrolled as one of the Section is to be a member of the American Bar Association, and to request such enrollment. The officers and members of the Council chosen for the ensuing year appear in the Directory of Officers of the Association, printed in the September and the present issue.

E. A. ARMSTRONG, Secretary.

Section of Legal Education

The Section of Legal Education and Admissions to the Bar held its first session on the afternoon of Tuesday, September 1st. The meeting was called to order by the Secretary, John B. Sanborn, in the absence of the Chairman and the Vice Chairman. It was announced that the Chairman, Silas H. Strawn, had been detained and could not reach Detroit until the following morning. After the appointment of a Nominating Committee consisting of Henry Craig Jones of Iowa, Theodore Francis Green, of Rhode Island, and George H. Smith, of Utah, the meeting adjourned until Wednesday morning at nine o'clock.

At the second session, Mr. Strawn made a brief address reviewing the work of the section during the past year. He stated that the officers of the section had been busy with two of its activites, namely, the classification and inspection of law schools and the bringing of the recommendations of the American Bar Association on the proper preparation for the bar, to the attention of prospective law students. Less satisfactory progress, however, is being made in the adoption of the standards recommended by the American Bar Association in the various states. He urged that the State Bar Associations, many of which have endorsed the standards of the American Bar Association, should continue their work in endeavoring to secure the formal adoption of these standards as far as possible in the various states. He also suggested that complaints had come to the Council of a lowering of the general standard of practitioners at the Federal Bar. This seems to have resulted from the influx of those who appear in bankruptcy and criminal cases, particularly in the defense of those charged with violation of the Volstead Act. He suggested that the Federal Courts should be urged to make an independent investigation of the character and fitness of those before them, along the lines already used in New York and Illinois, where special committees are appointed to make such investigations.

Andrew A. Bruce, of Illinois, introduced a resolution along the lines suggested by the Chairman and moved its adoption by the Section and that the Chairman be instructed to present it to the Bar Association for its approval. The resolution

was duly adopted and was also adopted by the Association on the following day.

Robert McMurdy, of Illinois, suggested that it might be advisable to have a probationary period after admission to the bar so that the young practitioner would be again required to undergo an examination, particularly upon his character, before being finally entitled to practice. He stated that it is frequently impossible to obtain the necessary information regarding an applicant for admission to the bar, or it may happen that his character is not formed sufficiently so that the examining board can tell how he will meet the temptations to which he will be subjected in his practice. Mr. McMurdy's suggestion was submitted to the Council for its consideration.

Charles H. Hepburn, of Indiana, suggested for the consideration of the Section and the Council, the possibility of the publication of a journal to be devoted to the interests of Legal Education and Admissions to the Bar, and edited under the supervisions of the Council.

The officers elected for the ensuing year appear in the Directory of Officers of the Association published in the September and the present issue.

JOHN B. SANBORN, Secretary.

Judicial Section

Vice-Chairman James I. Allread reported for the Judicial Section. Mr. Justice Pierce Butler, Chairman of the Section, was unable to be present.

The meeting was well attended by judges throughout the country and great interest was manifested.

Judge Arthur J. Tuttle, Federal District Judge in Detroit, made the Address of Welcome. This was responded to by the acting chairman.

Judge Maurice H. Donahue, of the Sixth District Federal Court of Appeals, read an interesting and instructive paper on "Courts and Judges."

Judge Martin T. Manton, of the Federal Court of Appeals of the New York District, read an able and well considered paper on "The Criminal Law in the U. S. Courts."

Judge John J. Sullivan, of the Ohio Court of Appeals, read an interesting paper on "Some Thoughts on the Trial of a Law Suit."

Judge Lucien J. M. Malmin spoke on the subject of "The Virgin Islands."

The dinner of the Section was largely attended.

Among the speakers were Judge Carrington T. Marshall, Chief Justice of Ohio, Judge Joseph A. Moynahan of the Michigan Circuit Court, Judge Lewis B. Ewbank of the Indiana Supreme Court and Judge Katharine Sellers of the District of Columbia.

Dr. William Draper Lewis gave the judges a brief insight into the work of the Institute for the Restatement of the Law.

JAMES I. ALLREAD, Chairman.

Section of Criminal Law

The meeting of the Criminal Law Section of the American Bar Association was held at the Hotel Statler, Detroit, Michigan, in two sessions, the first at 2:30 P. M., and the second at 8:00 P. M., both on September 1, 1925. The meetings were presided over by Honorable Oscar Hallam, of St. Paul, chairman of the Section.

The Section elected as its officers for next year: Chairman, Oscar Hallam, of St. Paul; Vice-chairman, Alfred Bettman, of Cincinnati; Secretary, Justin Miller, of Minneapolis; and adopted for submission to the American Bar Association a resolution calling attention to the need for a comprehensive survey of the administration of criminal justice, and requesting the association to provide funds and to designate directors for carrying on such a survey.

Five addresses were delivered during the course of the two sessions. The chairman, Mr. Hallam, spoke upon the subject of "The Need of Better Information as to Crime and Criminal Procedure"; referring particularly to the absence in all states of comprehensive criminal statistics and even of well kept records from which such statistics can be compiled; the confusion which results from lack of uniform nomenclature for crimes and the widely quoted misinformation which results from comparing statistics of crime in one city with those of another. He cited figures on homicide from all parts of the United States which indicated that unlawful killing, contrary to common report, is actually decreasing, and that much of the apparent increase can be accounted for in automobile homicides. In the field of crime generally the apparent increase is caused by violations of motor vehicle laws and violations of prohibition laws. The speaker urged the establishment of permanent bureaus or commissions in each state, charged with the work of collecting and making public correct information about crime conditions.

The second subject discussed was "Suggestions for Reform in Criminal Procedure Through State Action." This paper was read by Charles K. Burdick of Ithaca, and dealt with the various steps in procedure; the speaker urging that many of the historical safeguards thrown about the defendant could be well removed by state legislative action.

The third speaker was Honorable Herbert S. Hadley, former governor of Missouri, now Chancellor of Washington University, who spoke upon the subject "Our Criminal Procedure Historically Considered." Mr. Hadley's address was particularly interesting because of the figures and comment which he was able to present relating to present day conditions, which had been collected by the special committee of the American Law Institute of which he was chairman, as well as from his own experience in criminal work as Attorney General of Missouri. Mr. Hadley revealed as one of the important reasons for the serious discrepancy which exists between criminal procedure in our state courts as compared with the English courts and our own federal courts, the lack of power and of responsibility of judges in the state courts, followed by an appalling ignorance on the part of those judges of the actual seriousness of existing conditions. Other reasons are the higher standard of jurors in England and in the federal courts; the greater availability of witnesses in these courts, because of the elimination of state boundary lines; the power of judges to comment upon evidence; and the greater dignity and better justice which results from longer tenure of judges' terms.

Alfred Bettman, of Cincinnati, the next speaker, discussed the subject, "Some Suggestions Concerning Improvements in the Administrative Organization and Methods of the Prosecution." Mr. Bettman was the director of that portion of the Cleveland Survey which dealt with prosecution, and he drew heavily on that experience to demonstrate his ideas. He emphasized the importance of the executive side of the prosecutor's work as distinguished from the more flashy forensic side which the public generally knows, and in this connection quashed the prevalent idea that a change in personnel of the office can alone accomplish much; the importance of early detection and punishment of first offenses as a deterrent of habitual crime; the importance of getting results in "day by day run-of-the-mine lesser offenses" as well as in sensational cases; and the importance of orderly, impressive justice in the lower courts where the greater part of the population see justice at work. He recommended care in the selection of the whole staff of those engaged in prosecution; support of those who are efficient and exposure of those who are inefficient; and thorough re-organization of the whole machinery of prosecution.

The last address of the evening meeting was given by Mr. Charles R. Holden, President of the Chicago Crime Commission, upon the subject "Public Interest in Crime." Mr. Holden pointed out the instinctive interest of people in morbid, sensational events and the lack of success from the newspaper point of view of the reporting of criminal cases upon a basis of simple, truthful narrative. He stated that the interest of most people in criminals is due to distorted news stories which make heroes of them and idealize the relations between attorney and criminal client. He estimated the number of persons actively engaged in crime as very small and suggested that it would be cheaper to pay them salaries, if this would prevent their depredations. He outlined as the chief factors in the problem of dealing with crime, first, the fact that crime is being carried on as a matter of organized business; second, that the professonal criminal has become a power in politics; third, the passage of such laws regulating business and personal actions as have produced frank evasion or contempt for law generally; fourth, the sociological and psychological movements which, regardless of their merit, have developed a spirit of weak sentimentality toward crime. He suggested that the work of crime commissions which have sprung up in various places, while undoubtedly effective, could probably be made more effective in undertaken by bar associations; and that only in this way can a healthy wholesome public attitude toward crime be created.

JUSTIN MILLER, Secretary.

Bureau of Comparative Law

Address of Chairman William W. Smithers

Never before, since our work was inaugurated in 1908, has its importance had more general recognition than during the last twelve months. The intervening years were marked by substantial progress but specific instances of practical application of the principles of the subject were scattered, experimental and without any enthusiasm manifesting a definite doctrinal acceptance. However, from a general indifference and apathy we have seen emerge a constantly increasing interest and widening effort. Legislative reference bureaus, compendiums of world legislation and jurisprudence on special subjects, citation of decisions of courts of other nations in difficult cases involving new questions, chairs of International Law and Comparative Law in many of our Universities and a vast increase in legal literature touching other lands all revealed the evolutionary progress, knowledge of which our JOURNAL, with its large circulation, has served to put upon the desk of the leading lawyers of our country. Then came the broadening influence of the Great War and its ensuing increase of international relations. The field of private international law has in consequence acquired a practical importance which cannot be ignored. American lawyers have at last recognized the imperative necessity of being able to deal intelligently with these new and multiple questions involving conflict or variation between our own laws and those of other lands. Interests of clients must be protected by wise counsel and intelligent practical guidance.

Knowledge of the Common Law alone is no longer adequate. We have reached a sensible appreciation of this truth. It was implanted beyond future doubting last year by the epochal event of all legal history when we were the guests of the Bars of England, Scotland, Ireland and France. No man who went upon that happy pilgrimage will ever again be content to know only the Common Law. The Laws and jurisprudence of all other lands will have an unending interest for him. Moreover, since our return we have realized with increasing sureness that our lawyers must rise to the professional consequence of our country having become the banker and the vendor of the whole world.

A signal recognition of the situation is revealed in a resolution adopted in January last by the Ohio State Bar Association and the appointment of a Committee to study "the questions and problems involved in the practice of foreign and international private law" and to cooperate with this Bureau and other bodies engaged in their study or promotion. The professional distinction of the committee appointed leaves no doubt about the importance attached to the subject.

There was also significant action taken last winter within the membership of this Bureau.

At the 1924 meeting, as if in anticipation but really because our work had already reached a point calling for sectional cooperation, there was asked and granted permission to form a branch in New York. This was taken up in conjunction with a committee of the New York Bar Association. At the first joint meeting the broader phase of interest was indicated by a communication from the Societé de Legislation Comparée of France suggesting affiliation in some form. The whole subject was thoroughly considered and upon the recommendation of a committee composed of members of this Bureau it was decided that the subject had become so enlarged that two distinct fields—the educational and the practical—ought to be provided for. In consequence it was determined not to form a New York branch but to leave the academic or scholarly field to this Bureau as heretofore with its great educational opportunity through the JOURNAL, and to

form a new organization to meet the practical needs of the present relation of the profession to the field of private international law. This was done by forming the American Foreign Law Association, membership in which was immediately sought a large number of our American lawyers identified with affairs involving foreign laws. This association is destined to prove of great advantage to our country by its recommendations to government along treaty lines tending to eliminate conflict of laws, and also to commerce especially by cooperating with leading bankers and transportation enterprises to secure documentary uniformity. In addition the members are classified as to languages and laws of specific countries and so strictly regulated as to ethics that interests of the clients will be safeguarded. The formation of this Association was also participated in by the Federal Department of Commerce and much aid and encouragement was received from the Section of Legal Information of the Division of Commercial Laws. This Department has for several years recognized the importance of our work and has ably and intelligently supplemented it by issuing valuable Bulletins giving details of legislation of which our limited JOURNAL space in the April number each year permits us to print only the titles. With these encouraging efforts of our own government and the work of the long established societies in England, France and Holland, coupled with the actively aroused interest throughout our National and State Bar Associations, we have cause to believe that our timid, tentative and humble but persistent and hopeful efforts since 1908 have at last achieved a lasting place for Comparative Law in this country.

Section of Patent, Trade Mark and Copyright Law

The meeting of the Section of Patent, Trade Mark and Copyright Law of the American Bar Association, was held at Cass Technical High School in Detroit, on September 1, 1925. There was an unusually large attendance. In the past sometimes not more than a dozen or so of the faithful have gathered together, but this year there were perhaps a hundred present and much interest was displayed in the proceedings.

The Chairman of the Committee on Trade Mark Law reported that the revision of the Federal trade mark acts undertaken by the committee and endorsed at the last session by the Association, had been introduced into Congress, that hearings had been had by a joint session of the Senate and House committees on patents and the bill favorably reported by the Senate committee. The congestion in the short session of Congress prevented its further consideration. Since the bill has received substantially unanimous professional endorsement, the committee reported that its passage may be expected at the next session of Congress.

The committee asked to be discharged, in view of the fact that its duties had extended over a period of five years, that its function was to draft an acceptable measure, and this had been accomplished. It was suggested that there be a new committee to follow, through Congress, this and other bills of interest to the section and work to secure their passage. A committee on legislation of which A. C. Paul of Minneapolis is chairman was thereupon appointed.

The section approved the so-called Vestal Bill for the Copyright of Designs, which provides that any original conception in relation to a manufactured product for the purpose of ornamentation of surface or other decoration, shall be copyrighted instead of patented. This measure has been under consideration for many years, has now been introduced in Congress in final form and is a much needed reform and a great improvement over the present law.

The so-called Perkins bill, revising the copyright statutes and providing that the United States enter the International Copyright Union (the Berne Convention), was considered. This measure has provoked much difference of opinion. Various interests are trying to reconcile their divergence in views, with the probability that a new bill will be introduced at the next session of Congress. Under the circumstances the section took no action.

A committee on copyright legislation was appointed to co-operate with the committees of Congress and render such assistance as may be possible.

As a result of the meeting of the Association in London last year contacts were formed then and later with various foreign groups interested in the protection of what is called on the other side "industrial property," embracing patents, designs, trade marks, unfair competition and the like. In order to keep up these contacts the section appointed a committee on "International Co-operation," whose duty is to keep in communication and collaborate with foreign groups, to inform itself of proposals and developments in foreign law so that ideas can be interchanged to promote uniformity of legislation with respect to industrial property, in short, to function in the international field of industrial property similarly to the commissioners on uniform state laws.

The report of the committee on revision of patent law was discussed at length. Every one concedes that the present practice is needlessly prolix and expensive, but opinions have differed about remedies. This committee advocated a drastic cutting down in number of appeals now permitted, including abolition of appeals from the Patent Office to the Court of Appeals of the District of Columbia, recommending as a substitute a bill in equity as now provided in R. S. U. C. 4915 and in such proceedings that the record in the Patent Office shall be admissible in evidence and may be supplemented by additional testimony.

The committee recommended that appeals to the Commissioner of Patents from the Examiners-in-Chief in interference cases be abolished, making the decision of the Board of Examiners-in-Chief final except by a procedure analogous to certiorari, and that the time limit for responses to the actions by the Examiner, including appeals to the Board and to the Commissioner, be shortened from one year to six months. The section recognized as a step toward simplified procedure, the desirability of reducing the number of appeals, and after a spirited discussion the recommendations of the committee were adopted and, if enacted into law, will greatly speed up and simplify a practice now unbelievably complicated and prolonged.

EDWARD S. ROGERS.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LEADING Cases on American Constitutional Law, by Lawrence B. Evans, Ph. D., Counsel to the Brazilian Embassy Washington, D. C.: Callaghan & Co., 1925. Second Edition, $5.50. The second edition of Dr. Evans' well known collection of cases on constitutional law is virtually a new book, since it is three times the size of the first edition. It contains 215 cases arranged in twelve chapters, each comprising from two to five sections. The cases are carefully edited. In every instance the essential facts are stated and the procedure by which the case reached the Supreme Court is indicated. Unnecessary portions of the opinions are omitted, and, where the Court was closely divided, dissenting opinions are often included. The orderly arrangement of the subjects and their subdivision is unusually good. In the first chapter, entitled "The American System of Government," the necessary foundation is laid for all subsequent study of the subject. The collection is comprehensive. It includes not only all the usual topics, but some which are not fully treated in other case books, such as, "International Relations," and "Protection to Persons Accused of Crime." The latter topic is of increasing importance because of legislation adopted during the late war and the growing disposition to censor private conduct. Of particular interest to lawyers is the extensive chapter on "The Jurisdiction of the Federal Courts." A special feature of the book which makes it very helpful, not only to students and teachers, but also to practitioners, is the copious notes at the end of each section, in which are expositions of the subject matter of the section, summaries of many hundred decisions and references to valuable discussions in books, periodicals and state papers. For instance, at the end of the section on "Judicial Review of Executive and Legislative Action," there is a note occupying eleven pages, in which is included a list of all the cases in which the Supreme Court has declared any act of Congress unconstitutional. The publisher is to be commended for the attractive form in which the book is issued.

Washington, D. C. CHARLES W. NEEDHAM.

Under the editing of A. H. Thomas, the Cambridge University Press has reprinted for the city of London the *Calendar of Mayor's Court Rolls* from 1298 to 1307 as they have been preserved in the archives at the guildhall. The cases are reported very briefly, ten or a dozen lines being above the average. Thus in the 264 pages of the book enough are given to afford a rather thorough cross-section view of the economic life of London over six hundred years ago. The majority fall into two categories; first, those in which the defendant is charged with violating some rule of his guild, as for example by selling above or below the price fixed; second, those in which he has evaded the regulations governing commerce with foreigners, a commerce which was confined within very narrow limits. Amusing, too, is the frequency with which a few litigious individuals appear and reappear in court. So far as the general reader is concerned, he will hardly care to read through from cover to cover, but taken in small doses, in the manner in which one reads Pepys' Diary, it is most interesting.

The Institute of Comparative Law of the University of Lyons is continuing to render valuable service to those interested in comparative law. One of its most recent publications is the first volume of a series to contain the translation into French, of the Russian Soviet codes. The present one includes the *Code of Family Law* and the *Civil Code.* The translators are M. Jules Patouillet and M. Raoul Dufour.

Another book dealing with foreign law is *An Outline of Chinese Civil Law,* by Robert T. Bryan, Jr. (Shanghai: The Commercial Press. Pp. vi 92.) There are four chapters dealing with sources of the law, family law, civil and commercial law, and constitutional law. In view of the brief compass of the book it is clear that it can be no more than the barest outline. Footnote references to cases and to articles in periodicals, as well as to other books, however, open the way to more minute study. For those mainly interested in seeing how a civilized nation of wholly different traditions from our own looks at its legal problems it may well be that a quick, sweeping survey of this sort is more useful than an examination of the minutiæ from which the controlling principles must be induced.

The Oxford University Press, American Branch, is publishing in pamphlet form a lecture on *Legal Personality,* by W. M. Geldart (pp. 23, $0.50), which originally appeared in the Law Quarterly Review in 1911. While the cases specifically referred to are all British, the writers mentioned are world-wide, and in the few pages covered there is an examination of the fundamental nature of personality (especially of corporate personality) which is as useful to the American as to the English reader.

E. W. PUTTKAMMER.

Men and Policies. By Elihu Root. Harvard University Press, 1924. $5.00. This is one of several volumes containing the addresses and state papers of Mr. Root during his period of public service and the subsequent years of his active life. The volumes taken together afford a striking demonstration of the variety of the interests of the author, the scope of his powers and the zeal of his citizenship. The volume under review is perhaps the most significant of all. It is divided into three parts. The first has to do with the lives, character and services to the nation of eight Americans, including Alexander Hamilton, Abraham Lincoln, Theodore Roosevelt, Grover Cleveland and

Robert Bacon, among the statesmen; Andrew Carnegie in the world of business and philanthropy; James Russell Lowell in the sphere of letters, and Joseph H. Choate, the lawyer. The second part contains certain notable addresses upon subjects related to the law, including the Constitution, legal education and the proposal for the Restatement of the Substantive Law to be made by the American Law Institute. The third part relates to the war and the great world problems following its termination, including addresses and writings upon the League of Nations, the Codification of International Law and the Permanent Court of International Justice.

The memorial address upon Theodore Roosevelt, with which the volume opens, is a carefully prepared review of the character, talents and contribution to his time of "this very great man," as he terms him, but with some reference to the "trifling defects of his great virtues" and to his "little foibles." In view of the intimate association of the two men in both public and private affairs, it is of inestimable value and interest as a contribution to the contemporary judgment of the champion of the strenuous life. The portion of the address devoted to the influence of Roosevelt upon his time in the life of civilization is most impressive. It is of interest to note the repeated statement that Mr. Roosevelt was the most hospitable to advice of any man that the writer had ever known, an estimate which will afford both surprise and enlightenment to many readers.

The London address upon the occasion of the dedication of Saint Gaudens' statue of Lincoln challenges our admiration for its high diplomacy, effective beyond any effort yet made to bring to the British mind an understanding of Lincoln, and to inspire in the British heart a veneration for him and a pride in him as a son of the Anglo-Saxon race.

The address upon Alexander Hamilton is one of the most eloquent, written in a spirit of the warmest admiration of a man whom he characterizes as the greatest teacher of the art of self-government in the history of the world. He concludes his tribute with the striking statement that "if there had been no Hamilton, there probably would have been no Lincoln," because there would have been no Union for Lincoln to save.

The reference to the less known Robert Bacon is a really beautiful tribute to a fine American of a type which must be admired by all and may well be emulated in particular by the university men of our country.

Upon the whole these addresses on Some Americans constitute not only a valuable contribution to literature, in many respects models of the occasional address, but take on their greatest importance as an urge to the English-speaking world to a better understanding and a deeper appreciation of the character and strength of men who in varying degrees contributed so much to their periods in American history.

The addresses upon the law and allied subjects exhibit the same breadth of view, sanity of judgment and high ideals which have brought such distinction to Mr. Root in his profession. There is no hint that success at the bar is related to money making but always to the development of talents and character through service, always with the public interest at heart.

The address at the first meeting of the American Institute at Washington made a profound impression upon lawyers and laymen at the time. The movement for a Restatement of Substantive Law was regarded in many quarters as a dream impossible of realization. It was doomed to failure if the leaders of the bar were without faith in its success. In this address there is a note of practical optimism which was more forceful than any definite assurances suggestive of overconfidence which could have been given and was admirably designed to hearten the lawyers to their task.

The addresses in the third part of the book having to do with the war and the readjustments for peace are too serious in character and too elaborate to permit of brief review. The addresses of Mr. Root upon these great subjects are of particular value because they embody the ripened opinion of a statesman of long and varied experience in public life, who now, freed from the restraints of official position, can give with candor his theories and his conclusions upon these international questions of such solemn import.

Upon the whole the book breathes the spirit of sane optimism as to the future of our country, of faith in her institutions and of confidence of her future. It asserts that the standard of public and official purity and integrity is today far better than it was a half century ago, that the interest of the people in political and public affairs is far greater and more effective, and that there has been on the whole a great advance in the art of self-government. Mr. Root affords a distinguished example of tolerance and patience with what seems slow progress in domestic and foreign affairs. His speech at the Institute of Politics at Williamstown, Massachusetts, in 1921 preaches the doctrine most impressively. He believes, to use the phrase of Sidney Webb which has been so effectively used of late in the defense of Government policies in England, in the "inevitability of gradualness," that the heights can only be reached by many and short steps.

Chicago. VICTOR ELTING.

A Treatise on International Law, by William Edward Hall, M. A., Eighth Edition, Edited by A. Pearce Higgins, C. B. E., K. C., LL. D., Oxford, University Press, 1924; pp. XLVIII + 952; $12.00. Hall on International Law has long been known for two qualities, its stimulating critical discussion of the law and its incurably British outlook. For the first of these, in spite of the second, it has long been the one treatise in the English language to which above all others students have been referred for illuminating discussions of the problems of the law.

The seventh edition, issued in 1917, contained, of course, the original text, and for that possessed as much value as ever. It also contained many notes and interpolations by the editor, who also prepared the present edition, and an extended Preface by the same writer, all of which, especially the Preface, reflected the spirit of the times.

The present edition contains those same notes and Preface and the incurably British outlook of the original has thereby been intensified and the hysteria of 1917 in large measure preserved. The Report of the Committee appointed by the British Government on alleged atrocities in Belgium is still given as the last word on that subject in spite of the widespread revision of judgment on this matter which has taken place since 1917. The extension of belligerent rights at sea is explained as unblushingly as ever in terms of the *principles* of the law at the expense of the rules, in terms of the *development* of the law at the expense of its present authority.

in terms of "the circumstances and necessities of war" (p. 871). We are told (p. 891) that "during the war of 1914-1918 neutral vessels found it to be to their interest as expediting examination to enter British ports voluntarily for this purpose." It is impossible to find a case where Britain is admitted to have been wrong in her belligerent practices during the years 1914-1918, all laws of possibility and probability to the contrary notwithstanding. The editor is Lecturer on maritime law at the Royal Naval War and Staff Colleges.

When dealing with the law of peace, and it is interesting to note the editor's opinion that more changes have to be made here than in the law of war, in spite of the strain of 1914-1918, much attention is given to what the reviewer would call International Organization, as contrasted with International Law. The editor seems to confuse institutional organization and procedure with statements of rights and duties, or customary law on the latter with international constitutional enactment creating organs of international government. Thus he says (p. v) that the important consequence of the treaties of 1919 for international law was the creation of the League of Nations and the Permanent Court, that the aim of international law (p. vii) must be to provide peaceful solution for international differences and that the League has been established for the purpose of assisting in the promotion of peace and international cooperation. It is the judgment of the reviewer that international law has in the main no necessary connection with either peace or the League of Nations, and that international law certainly does not exist to promote peace nor is it affected except in relatively restricted sections by the creation of the League. The law deserves to be cultivated for what it is worth—as a standard by which to measure the rights and duties of nations. The League deserves to be supported for what it can do for peace and cooperation among the nations. But only harm can come from blurring the clear outlines of international law by mixing it up with political aims, either international or national, and the League can only be crippled by being approached from a strictly legalistic point of view.

The American reader is bound to be interested in the legalistic Tory-Imperialist presentation of the position of the Dominions in the Empire, as contrasted with the ultra-practical and realistic interpretation of the action taken by the Allies in requiring new states to give pledges regarding their treatment of minorities within their boundaries. He will also be surprised to see the American case for fortification of the Panama Canal—at a time when we did not have the same means of protecting the Canal as Britain has always possessed in reference to the Suez—made to depend upon the clause in the treaty giving us power to maintain a military police in the Zone.

For the courageous disagreement which the editor expresses with the ruling cases extending immunity to judicial process to public vessels even when engaged in commercial enterprises the reviewer has every admiration.

To repeat, Higgins' Hall is by Hall's contributions a stimulating British work on the problems of the law of nations and by Higgins' contributions an even more intensely British work with much International Organization mixed in with the International Law and many new moot problems left to provoke thought on the part of the reader.

PITMAN B. POTTER.

University of Wisconsin.

The Principles of Corporation Law, by William W. Cook, of the New York Bar, Author of Cook on Corporations; The Lawyers Club, University of Michigan, Ann Arbor, Michigan, 1925; pp. 815; $2.50.

While the privilege or rather usurpation accorded Margot Asquith of reviewing her own book may perhaps not be quite the appropriate thing in extra-memoir circles, nevertheless Mr. Cook's preface, at once his platform and his confession of faith, deserves quotation in entirety here, both for its model brevity and for its succinctly stated aims. He says:

"This Book is an experiment to condense, simplify and clarify the law, for the use of the lawyer, law student and layman.

"In an article published in the Michigan Law Journal in February, 1923, on the 'Law Book of the Future,' I proposed a new type of text-book, stating general principles with a few applications, and with foot-note references to elaborate text-books and to the decisions of the Supreme Court of the United States. This book has been written on that theory, the references being chiefly to the eighth edition of the author's six-volume work on corporation law, and to the decisions of the Supreme Court. References to very recent decisions are also added."

This "new type of text-book", in the main, follows out successfully the author's method and purpose. It is indeed a full statement of the law as applied to the constantly enlarging field of corporate activity. The text is concise; the foot-notes are reduced to an almost unbelievable minimum. The style is readable and scholarly. The definitions are very good. The twenty-five chapter heads and detailed sub-lying analyses are well done. The conjoined Table of Cases is thorough and comprehensive; as is also the General Index. The book itself is bound in flexible and usable form; its thin paper makes it far from bulky. All told, mechanically and essentially, this is a work of admirable legal writing.

It is based, necessarily of course, on the author's earlier and more elaborate work, yet has a distinctiveness all its own. Mr. Cook seems to allow himself more freedom here. The mellowness of ever ripened wealth of legal experience finds its seasoned expression in such a proper outlet. Mr. Cook states his own reasoned views; he does not merely collect and enumerate the multitudinous decisions. The book is the literary child of his legal senescence. And by the same token his most cherished; upon it he has taken the greatest pains. The result is no mean accomplishment.

WM. S. MIDDLETON.

Harrisburg, Penna.

The ghost of John Austin still stalks the stage of our jurisprudence. The terrific attacks which it has withstood from the time of Sir Henry Maine to that of Harold Laski have indeed made it somewhat paler, but it still exerts a profound influence on our legal philosophy. If one were to desire

proof of this influence, he could hardly do better than to read the *Fundamental Concepts of Public Law* (Macmillan, N. Y., 1924. $4.00) by W. W. Willoughby. The aim of the author is to study the decisions of the courts on questions of public jurisprudence in order to discover how closely they follow a consistent system of deductive philosophy. Professor Willoughby has again proved the ingenuity and consistency of his political theory, and has stated his views with exceptional clearness. The whole argument, of course, centers around the concept of sovereignty, and in this portion of the book the author follows very closely the modifications of Austin's theory which he had previously elaborated in his work on the *Nature of the State*. The investigation of the decisions of the courts, however, is entirely new, and in many respects the last portion of the book is more interesting than the first. The topics covered are mostly those of international law, public or private, and a few questions of constitutional law; especially due process, taxation, and the suability of the state. This examination of judicial decisions reveals that the courts, with a few notable exceptions, have followed a very consistent line of legal development, even in the domain of public law. Whether this is because of the inherent strength of the judicial process, or because both the courts and Professor Willoughby have followed the tenets of Austin, it is obviously impossible to say. It is evident, however, that there is a real danger in this type of investigation. The investigator who is expecting to find a certain result may honestly discover it whether it really exists or not. Until the social sciences have developed more exact means of measurement, it is exceedingly hazardous to test any theory by this method.

University of Chicago. RODNEY L. MOTT.

The "Machine" abolished by C. C. P. Clark, M. D. New York: Putnam, Pp. xvi, 196. $1.50. Here is another of the many books dealing with our system of government which sees our difficulties and shortcomings only in the terms of the one thing needful, the one change which ex proprio vigore will remove all ills and produce a final state of governmental perfection. The panacea here offered is at least a novel one. Our troubles are all due to the system of party government and the resultant indifference of voters. Let our voters be united in groups of about 200, chosen by lot. Let them meet and choose a wise man to represent them. Turn everything over to these wise men, and presto, the thing is done and all is well, or, as the author more beautifully puts it, then will Democracy clothe itself with the purple habiliments of Caucus and Convention and wield their very sceptre. The book is called a second edition. The care with which revision has proceeded is indicated by the fact that United States senators are still spoken of as being elected by state legislatures.

Of indirect significance to the legal profession are two new translations of the writings of Dr. Sigmund Freud, *Group Psychology and the Analysis of the Ego* (pp. 134 $2.00) and *Beyond the Pleasure Principle* (pp. 90 $1.50). Both are published by Boni & Liveright. The former, more especially than the latter, will perhaps further that form of applied psychology so effectively urged on trial lawyers in Munsterberg's "On the Witness Stand." E. W. PUTTKAMMER.

CRIMINAL JUSTICE IN AMERICA

Present Conditions Historically Considered*

By HON. HERBERT S. HADLEY
Chancellor of Washington University, St. Louis

SO much has been said and well said by the previous speakers on this program that there is little, I fear, that I can add that is new or interesting. I will, however, endeavor to state facts and conclusions rather than indulge in discussions of general principles or theories of reform in the criminal law.

During the course of the last national campaign, one of the leading Chicago newspapers directed its reporters to make inquiries of representative citizens as to what they regarded as the most important public question. Three out of every five answered that the most important public question in this country was how to secure a better enforcement of our criminal laws. These answers would seem to express the general public feeling. Civic and professional organizations throughout the country are giving this question special consideration and it is unusual to find a magazine or a newspaper without some observations on the subject. Three years ago the American Bar Association appointed a special committee to investigate and report as to conditions affecting law enforcement, of which committee Governor Whitman and Judge Kavanaugh, who have spoken in this course of lectures, are members. This Committee investigated conditions in this country, and in England and France, and the two reports submitted constitute valuable contributions to this discussion. Two years ago the American Law Institute appointed a Committee, of which I was a member, to investigate and report as to the defects in the administration of criminal justice. This report will be made public at the coming meeting of the Institute, next May. And in view of the fact that the majority of the Committee felt that the report should be largely confined to such matters as related to the advisability of a restatement of the criminal law, I can give you tonight some of the facts bearing upon

*One of the series of five lectures on "Criminal Justice in America" delivered before the Bar Association of St. Louis during the early part of 1925. The previous lectures have appeared in the JOURNAL.

the larger question of the administration of justice which were secured in this investigation.

Recently the Executive Committee of the American Bar Association, the Association of American Law Schools, and the Institute of Criminal Law and Criminology have requested the American Law Institute to undertake the formulation of a model code of criminal procedure, and it is hoped this important work may be undertaken by this organization. Altogether we have had in the last three or four years the most sustained and vigorous challenging of our system of administering criminal justice that has ever occurred in this country.

What is the warrant for this agitation? Are conditions as bad as they are reported, and do they justify the general dissatisfaction that has found expression through these different agencies to which I have referred. My own idea is that they fully justify this public concern and agitation. While our criminal statistics are incomplete, unscientifically collected and recorded, and often times unreliable, we have enough that are dependable to justify the statement of the American Bar Association Committee that we are the most lawless civilized people in the world. Over nine thousand unlawful homicides occur every year, while the number of felonious woundings is, of course, much larger. The financial loss incident to crimes against property is variously estimated at from five to ten billion dollars a year, according to whether the direct or the direct and indirect losses are considered. In some parts of the country observance and respect for law have almost ceased to exist by reason of the practical breakdown of law enforcement. Not only are minor offences brazenly and openly committed, but organized gangs, as shown by recent local disclosures, plan and commit robberies and burglaries, kill officers of the law, law abiding citizens, members of rival gangs, and also each other with no more of compunction or hesitation than the ordinary citizen would kill a chicken for his dinner table.

I gathered in the investigation I made, as Chairman of the Committee of the American Law Institute, statistics from a majority of the states, and I have examined carefully those gathered by other Committees and Commissions and it is my judgment that of those committing major crimes such as homicide, burglary, robbery, assault, etc., not one out of every ten is apprehended and adequately punished. And if we include in our calculations such minor offenses as violations of the state and national prohibition laws and other regulatory measures, not one offender out of twenty is apprehended and punished. If we include only such offenders as are apprehended and prosecuted, I estimate that not over 30 per cent are convicted and adequately punished; and of those who are actually placed on trial before a jury less than 50 per cent are convicted and adequately punished. I use the expression, "adequately punished," to indicate the minimum punishment fixed by law. Lest this last per cent should be questioned, in view of records frequently presented by prosecutors of 70, 80 and even 90 per cent of convictions in cases tried, I wish to call attention to the fact that fully one third of our cases appealed are reversed, or reversed and remanded, and a small percentage of convictions is obtained in the second trials. There is also judicial and executive clemency which saves many a convicted criminal from final punishment and forfeitures of appeal and other bonds add a considerable number. So I give it as my carefully considered judgment that our system of apprehending and prosecuting those who commit major crimes is only about ten per cent efficient; that as to all offenders it is only about five per cent efficient; that of those apprehended and indicted for major offenses it is only from 25 to 30 per cent efficient; and that of those actually tried for major offenses, it is not over 50 per cent efficient. Those who have to deal with problems of business, finance, transportation, science or education can perhaps the better understand what these figures mean, if they will consider what would be the result in other enterprises or occupations, if the percentage of efficiency ran from 5 to 50 per cent. We should all of us stop to consider as to how long organized society can continue to exist depending as it does for the protection of life and property upon a system that is from 50 to 95 per cent inefficient.

When we consider that no such condition approximating ours exists in other civilized countries, we may well ask what are the causes, for the question must be asked in the plural, of this condition here. The causes are numerous, including inadequate and inefficient police departments, inefficient prosecuting officers, poor judicial systems, and lack of coordination between examining magistrates, police prosecutors and trial courts, indifference of juries to their public duties, easy going public attitude towards crime, sentimental and emotional pardon and paroles, our division into forty-eight different trial jurisdictions with the opportunities thus offered for escape of defendants and of witnesses, multiplicity of regulatory laws not supported by strong public opinion, and many other causes more or less important. But the principal influence that makes for an inefficient administration of justice in my opinion is our cumbersome, archaic and ineffective system of criminal procedure with the glorification of technicality and formalism which it fosters and maintains. The effect of this system with its apparently inevitable delays and defects of justice is also to create a flabby as compared with a stern and vigorous sense of justice on the part of public officials and the public generally.

Lest I may seem to place too much emphasis on one conceded defect, let me briefly state to you some of the advantages that one charged with crime under this system has over society when an effort is made to enforce its laws:

1. The defendant can insist on a speedy and public trial and profit by denial of this right. While the state may *urge* a public trial, it has no means to enforce it.

2. The defendant must be advised as to the nature and the cause of the charge against him. The state has no right to be advised as to the nature of the defense.

3. The defendant may change his defense during the trial, but the state cannot amend the indictment or information except in matters of form and even this right does not exist in a number of states.

4. The defendant must be given a list of the state's witnesses before trial, but the state has no right to know of the witnesses for the defense.

5. The defendant has the right to require the state to present its case in preliminary hearing, but the state has no right to require the defense to be shown.

6. The defendant has the right to disqualify by affidavit the examining magistrate. Generally the state has no such right.

7. The defendant may challenge the members of

the grand jury for cause, but this right is not generally enjoyed by the state.

8. The defendant can ask for change of venue to another county on the ground of public prejudice, but with few exceptions the state cannot do so.

9. The defendant may disqualify the trial judge by affidavits alleging prejudice, but the state with few exceptions cannot.

10. In practically every state the defendant has more peremptory challenges as against the trial jury than has the state.

11. The defendant may employ as many lawyers as he is able to hire, but the prosecution in many states cannot have special counsel.

12. The defendant may comment upon the failure of any state witness to testify, but the state cannot comment on defendant's failure to testify.

13. The state's witnesses may be cross examined without limit, while in many states the defendant can be cross examined only as to matters testified to on direct examination.

14. The defendant generally is accorded the right to take depositions of witnesses, but generally the state does not possess the same right.

15. The defendant can use a transcript of the record of preliminary hearings or coroner's inquest testimony, but the state except under special circumstances cannot do so.

16. The defendant is presumed to be innocent and may be acquitted on reasonable doubt as to criminal intent even when the act is proved or admitted; the state must prove guilt beyond reasonable doubt.

17. A defendant pleading insanity is not required to show it beyond reasonable doubt, but only by a preponderance of testimony, and in some states if a reasonable doubt exists as to the defendant's sanity he must be acquitted on the ground of insanity.

18. The defendant has full right to appeal from all adverse rulings during the trial and from the verdict of guilty. The state has no right to appeal from a verdict of not guilty, and only in a limited number of states can it have the rulings of the trial court upon questions of law reviewed, and then only as a precedent for other cases.

19. The defendant may plead former jeopardy if the state's case fails through any mischance, such as absence of a witness; but the state, except in exceptional cases, cannot show previous convictions of the defendant except to impeach his testimony.

20. The defendant in many states can prosecute an appeal at public expense, while the state rarely collects costs from defendant even when the conviction is affirmed.

21. The defendant may ask for reversal of conviction on any grounds, including severity of punishment imposed, but the state cannot on appeal ask that the punishment be increased, as is the practice in England.

22. A defendant convicted of crime usually has the right to a hearing as to his sanity after conviction, though the state cannot ask for the re-opening of a case where defendant has been acquitted on the plea of insanity even though it is prepared to show that the defendant has regained his reason.

23. If all other advantages and methods of which the defendant can avail himself fail to prevent conviction and punishment, he may ask the Governor or pardoning board for reduction of sentence, parole, or pardon, and as shown by the record of almost every state he secures such clemency in far too many cases.

From this statement of the comparative rights of the state and of the defendants it is evident that we are not disposed to be unduly severe with those charged with violations of the law.

In answer to this somewhat extended list of advantages that the defendant enjoys, the question may be asked as to what one of the rules of our criminal procedure I would change. And this question emphasizes the real subject of my remarks tonight, viz., the historical reasons for our present system of criminal procedure and as to whether those reasons now exist.

It is fundamental to any system of criminal procedure that one should be advised of the nature and the cause of the accusation against him. You will all recall, that is I hope you will all recall, the striking statement of this principle of the Roman law found in the Biblical account of the trial of Paul. There probably never was any sufficient reason for our old common law form of indictment, and if there was, it certainly does not exist today. Its verbiage is to be ascribed to the natural tendency of all systems of jurisprudence, except the criminal law in this country, to begin with elaborate formalism and complexity and gradually develop into simplicity and directness. Further, in all common sense and fairness, should it not be sufficient, as it is in England today, to advise a defendant that he is charged with murder or robbery, specifying the person killed or robbed, and the time and place?

And why in all common sense and fairness should a defendant not be required to answer a criminal charge by disclosing his defense? The defendant has the right to see a list of the wistnesses against him. Why should the prosecution not have the same right to see the list of the witnesses who will testify in his favor? The defendant should, of course, have a right to a public and speedy trial, but the state should impose upon the trial courts the duty of enforcing a speedy trial in case the defendant, as is usually the case, seeks to avoid it. The defendant should of course have a right to be represented by counsel, but the methods of such representation are a matter that might well be made subject to rigorous professional and judicial regulation. Public opinion within the profession should justify and sustain such a limitation of this right as would promote rather than defeat the ends of justice.

The right of a defendant to be presumed innocent and not subject to conviction unless shown to be guilty beyond a reasonable doubt, would seem to be so thoroughly imbedded in our jurisprudence as not to be open to question. But this rule was devised in a time of tyranny and oppression when most important prosecutions were political, when nearly two hundred offenses were punishable by death, and it does not obtain in the law of the European countries and was not found in the Roman law. Today in the ordinary criminal case, after the police, the coroner's jury (if it is a homicide case), the examining magistrate, the prosecuting officer and the grand jury (usually composed of twelve men) have declared on their oaths, after investigation, that a crime has been committed and the defendant is guilty of it, it is almost an insult to intelligence to assert with the force and reiteration usual in criminal trials that the defendant must be presumed to be innocent of the offense charged. If he is presumed to be innocent, why is he prosecuted? In a system founded on logic

no presumption should be indulged either way. The statement of this presumption, as it has developed in our American courts, is far more than a statement as to the burden of proof. That the prosecution should prove guilt and prove it clearly and satisfactorily, is a logical and sensible rule; but the assertion that it is better that ninety-nine guilty men should escape than that one innocent man be punished is a sentimental enlargement of the statement of Emperor Hadrian that it would be better that two guilty escape than that one innocent be punished.

The rule that a defendant must be confronted by the witnesses against him is another inheritance from a time of monarchial tyranny and oppression. While it would be unwise to abandon this rule in principle, yet actual conditions demand that the state be awarded the right under proper safeguards to take depositions. Further, the right of the state to secure the presence of needed witnesses should be made a subject of treaty between the different states giving the right of extradition of a fugitive witness; and this right should also be secured by our National Government for the several states, and for itself through treaty with foreign countries. It is a reflection both upon our law and our morals that witnesses should be able to defeat the ends of justice by becoming fugitives from service in foreign lands.

The right of defendant or witness not to be compelled to testify to that which might incriminate him has been broadened under our American decisions, and the reasons for this rule have long since ceased to exist. Up to the latter part of the 17th century a defendant in England was required to submit to an examination and torture was frankly resorted to to compel him to talk. But in the Revolution of 1688 this was changed. In the interests of justice and in imitation of the rule of the civil law which disqualified an interested party as a witness the defendant was denied the right to testify at all; and being denied the right to testify it was as a matter of fairness provided, of course, that his failure to do so should not be commented upon. We no longer deny the accused the right to testify, but we keep the other provision which went with that denial and grant him immunity from comment for his failure to do so. Thus a rule which at its inception was a protest against torture and in the interests of justice has now become one of the most effective methods for the protection of the guilty. What could be more logical and sensible than to ask the defendant, who knows more about the facts than any one else, what he has to say about them; and if he will not disclose what he knows, why should not the state have the right to comment upon his failure to do so?

All these rules are inheritances from conditions that existed in England in the 17th and early part of the 18th century. But the two rules of our criminal procedure that work most effectively to defeat a proper administration of justice are rules which were developed in this country, the reasons for which also no longer exist. Following the Revolutionary War and the establishment of our government, in the concern that then existed as to official oppression, the trial judges were from time to time deprived of the right to dominate and direct the trial of a criminal case, as they have always done in England. The trial judges in most states were made mere moderators, with the right to instruct the jury (usually in writing) upon the law, and in some states, notwithstanding such instructions the jury were made the judges both of the law and the facts.

Further, as a result of the same concern as to official oppression and for the further purpose of developing a system of criminal jurisprudence of our own, the defendant was given an almost unlimited right of appeal to an appellate court although no such right had existed in the English practice. The conditions which resulted in the limiting of the authority of the trial judge and in giving the defendant unlimited right of appeal have of course long since ceased to exist. And in so far as the authority of the trial judge is concerned we should abandon the American innovation and go back to the original conception of what constituted trial by jury. Upon this point Professor Thayer, in his well known Treatise on Evidence, says: "Trial by jury in a form which would withhold from the jury the assistance of the court in dealing with the facts, is not trial by jury in any historic sense of the term." The limitation upon the power and authority of the trial judge as a dominating and directing influence in the conduct of the case, while general in the state courts, has never existed in the federal courts. And the more effective administration of justice in those tribunals as compared with the state courts is largely to be attributed, in my opinion, to this fact.

Thus, when we consider the rules of our criminal procedure we find that the extended and archaic form of our indictments, the presumption of innocence after full investigation and indictment, the strict rule of confrontation, the right against self incrimination and immunity from comment for failure to testify, were established as a part of our system of criminal procedure as the result of conditions existing in England two hundred years ago which never have obtained and do not obtain in this country today. And we further see that the law limiting the authority of the trial judge and giving to the defendant unlimited right of appeal was due to conditions existing in this country or imagined to exist which have long since ceased to obtain. While I would limit rather than abolish the right of appeal, the restoration of the trial judge to a position of authority is manifestly advisable.

Our jury system is subjected to much criticism and some even advocate its abolition. But it is a part of our civilization and political system as well as our jurisprudence and it serves the essential purpose of giving the people a part in the administration of justice. But the reasons for the jury system as first established have long since ceased. Originally the jurors were selected on account of their knowledge of the offense and for that reason they had to be chosen from the vicinage of the crime. As they decided more as witnesses than as triers of fact, unanimity was considered essential. All this has changed. In the Roman law the jurors were always triers of fact and a majority verdict was sufficient. Public opinion and public interests now favor, I believe, an abandonment of the rule of unanimity, except in capital cases, and juries of less than twelve for minor offenses should be provided for. Equally important, however, is the need of raising the standard of the individual jurymen. In only 12 of our 48 states are there requirements calculated to secure jurors who are representatives of the most intelligent and responsible elements of our citizenship. In 36 states there are no educational or property qualifications for jurymen.

There exists on the part of those who have given a careful consideration to this subject a general agree-

ment as to the advisability of most of these suggested changes in our criminal procedure. Why, then, are they not adopted? Why should we not regard our criminal procedure as a matter of social engineering and judge it by the results that it produces? In view of the historical facts, is it not clear that we are trying to use an eighteenth century machine to deal with a twentieth century problem? In commerce, finance, production, manufacture, distribution, science, art, education, medicine and usually even in religion, we are living in the twentieth century, but in our legal and particularly in our criminal procedure we are still operating on an eighteenth century basis. Our people generally still think of our system of criminal procedure in terms affecting the individual, rather than society as a whole. So with this conservative attitude on the part of the general public it is easy for the reactionary or the demagogue to appeal to public fears and prejudices whenever a change in our procedure is proposed. In fact, I think, it can be fairly said that most of the legislation enacted on this subject in this country in the last fifty years has worked to the advantage of the defendants rather than to the advantage of the state in the trial of criminal cases.

While it has been and is difficult to secure effective progress in making our system of criminal procedure more effective through constitutional amendments or legislative enactments, it is in the power of the appellate court judges to make changes which will affect the whole spirit and purpose of our system of criminal justice. There are serving in our appellate courts in the different states about five hundred men. If these five hundred men would act with common purpose and decision to relieve our system of criminal procedure of the intense legalism and glorification of technicality that now so greatly impair its effectiveness, they could do as much for the proper administration of criminal justice as all the rest of us combined. If they would declare and follow the rule that no conviction would be set aside except for an error directly affecting the merits of the controversy, or, to express it another way, set aside no conviction unless the error complained of justified a reasonable doubt of the defendant's guilt, a much better administration of criminal justice would be secured. But I venture the suggestion that this will not be done except in response to a public opinion within and without the profession that will demand it. By this I do not mean that our appellate judges are not generally high minded, honorable men, anxious to do their full duty. But whatever may be their intentions, when they go on the bench, apparently the influence of the traditions of our legal system and the very atmosphere of legalism and technicality in which they live and move and have their being soon have them searching the ancient precedents to determine the sufficiency of the indictment, the correctness of rulings on some comparatively unimportant issue in the admission of testimony or the instructions to the jury.

I am afraid that we cannot look for the reform of a system from those who administer it. It is difficult to get those who help to create a system to see its faults. In England, when Romilly was seeking to reform the criminal law by freeing it from its complexities and cruelties, the judges were arrayed in almost solid phalanx against him. Some threatened to resign if the reform bills passed, but the reform bills passed and the judges did not resign. When I proposed before the American Law Institute that we try to do something to improve the administration of justice in this country by improving the law, my suggestion was vigorously opposed by several appellate court judges, who claimed that the fault was with the police, the prosecutors and the juries. One chief justice of a State supreme court felt so strongly on the subject that he made an address which he circulated throughout the country contending that I was wrong in my declaration that many guilty men were escaping conviction, when the truth was that too many innocent men were convicted; and he extolled the great service that the appellate courts were rendering in saving innocent men from punishment. It is of interest to note in passing that there were in his State proportionately more unlawful homicides than in any other State of the Union except one.

From my investigation of the situation, I have reached the conclusion that our appellate court judges, and the profession generally, do not realize the disorganizing and injurious influence in the administration of justice resulting from a highly technical attitude towards records of conviction. Besides its effect on the actual cases reversed the fear of reversal hangs as a sword of Damocles over the heads of prosecutors and trial judges. Doubtful questions are resolved in favor of the defendants on admission of testimony and instructions to the jury, and prosecutors find it advisable to accept pleas of guilty to minor offenses rather than to risk a trial and the danger of reversal. In addition to "whittling away" the rights of society in favor of its enemies the effect of a technical administration of the law is to develop what is known as the sporting theory of justice. And thus a criminal trial tends to become a contest of skill and endurance between opposing counsel, rather than a judicial investigation to ascertain the truth.

Nor do the judges apparently realize the number of convictions that they set aside. For example, the chief justice of the supreme court of one of our leading States, whom I know personally, and who is an able, high minded man, said in answer to a question as to the effect of our rules of procedure and the reversals of convictions by reason thereof, "I do not think that the old rules of criminal procedure materially interfere with the proper administration of law in this State. Criminal convictions are seldom reversed in this State." Yet in an examination that I made of 209 decisions on appeals from convictions in criminal cases in his State, in the years 1912 to 1916, I found that over 35 per cent had been set aside for one reason or another. In a similar investigation that I made as to the percentage of reversals in ten representative States, I found that the average was nearly 33⅓ per cent—the percentage ranging from 15 per cent in Massachusetts to nearly 50 per cent in Michigan, Colorado and Missouri. In 1910 the American Institute of Criminal Law and Criminology appointed a Committee, of which Judge Gemmill of Chicago was Chairman, to investigate this question. The Committee wrote to the chief justices of a number of States for information upon this point. Some of the chief justices answered, giving their opinion of the number of convictions set aside, and those opinions varied from 1 to 10 per cent. Other chief justices turned the request for information over to the clerk of the court to examine the records for a number of years, and those answers showed that the number of

cases where the convictions were set aside was approximately the same as I found in my investigation.

In answer to the inquiries made by the Committee of the American Law Institute and the American Bar Association of the appellate court judges, there was often expressed not only an ignorance as to the effect of our technical rules of procedure, but also an impatience in some instances with efforts to correct them. The judge of one of the southern States wrote to Governor Whitman's Committee, "I think the criminal law is quite plain and simple, and there are few instances in which the trial courts commit reversible error, and as a rule, where there has been miscarriage of justice, this is largely due to the action of the jury. The great trouble is that so many of the reformers select the exception as a criterion for condemning law enforcement rather than the rule." And yet the president of the Bar Association in the State referred to said in a public address, "I have examined 75 murder cases that found their way in the supreme court, and *more* than one-half of these cases were reversed and not a single one of them on any matter that went to the merits of the case, and very few of them upon any matter that could have influenced the jury in reaching a verdict." This attitude on the part of the judicial mind makes important such a work of education as is incident to such meetings as these, and as is now in progress in this State.

The profession generally is also uninformed on matters relating to the criminal law. In the inquiry that I made of the presidents of the State Bar Associations and the members of the Council of the American Bar Association for the different States as to the defects in the administration of justice in their respective commonwealths, most of them frankly admitted that they did not know enough of the actual working of our system of criminal procedure to express a worth while opinion; and of those who had official reasons for being informed, there was by no means an agreement as to defects.

Of the 109 lawyers, judges and public officials who answered our inquiry, 24 regarded deficiencies in the police department, 19 regarded deficiencies in proceedings before examining magistrates, 40 regarded abuses of our parole system, 27 regarded the faults of police and court officials and unethical practices of defense lawyers, 16 regarded inadequate number and inefficient organization of courts, 30 regarded the inability to secure the presence of witnesses, 32 regarded the archaic and uncertain provisions of our criminal procedure, and 13 regarded the uncertainty and indefiniteness of our substantive criminal law, as substantial defects. Of the 28 chief justices only 4 considered our criminal procedure a hampering influence in the administration of criminal justice, while only 14 of the 39 attorney generals and prosecuting attorneys agreed with the 4 chief justices. A larger per cent considered the abuse of the pardoning power a more serious defect than any other point, and the next most numerous point of agreement was as to the injurious effect of our present form of criminal procedure.

There is no question in my mind that the reckless and ill considered granting of pardons and paroles by trial judges, pardoning boards and executives, constitutes a very serious defect. No more profitable investigation could be undertaken by the State Bar Association in every state than into the manner in which judicial and executive clemency is granted. Such an investigation made a few years ago in the State of Washington showed marked looseness and abuses and I believe similar results would be disclosed by a similar investigation in most of the states. There is just as much reason for due process of law in the consideration and granting of a pardon or parole as in the trial of a case; but it is the exception where this obtains. The establishment of boards of pardon and parole and their unwise and improper granting of pardon and paroles have done much to develop a flabby sense of justice in this country. Every one of these boards should be abolished and the responsibility placed on one official.

Turning against to the defects reported, the inability to secure the presence of non-resident witnesses was emphasized by 30, while 15 felt that poor juries, made so by the unwillingness of the better element to serve, was an injurious influence. Sixteen gave the "law's delay" as the most serious defect, and 12 thought the public indifference to the enforcement of the law and the flabby public opinion which tolerated lawlessness the principal cause of the defective administration of justice.

I have mentioned these various answers in order to show the lack of any consensus of opinion even in our profession as to the necessary work of reform. Further, we have had no such careful study and treatment of the criminal law and law of criminal procedure as we have had of different parts of our civil law. The criminal practice has, except in unusual cases, been abandoned as unremunerative and unattractive by the great majority of our better lawyers. The result is, therefore, not surprising. As a piece of social engineering our system of administering criminal justice has proved badly deficient, but no one in authority by reason of position or learning has pointed out the defects; though we have realized in a general sort of way that we were trying to make effective a system devised for social, political and industrial conditions of life, after those conditions had long since ceased to exist, very little has been done to adopt this system to conditions of modern life. And it is only by such efforts as are now being made by your Association and by the various organizations and agencies dealing with this problem that we can hope to secure such changes as will make our system of administering criminal justice an effective agency to protect society against its enemies. To secure that desired result we must develop both in public officials and with the general public a stern and vigorous sense of justice, and nothing, in my judgment, will do more to secure this condition of public and official mind than such changes in our system of procedure as will tend to make our administration of justice prompt, efficient and final, and free it from its present burden of technicality and formalism that a dead past has imposed upon it.

Progress of Zoning

There has been an increase of more than 130 per cent in the number of people living in zoned cities and towns in the United States during the past four years, states a recent bulletin of the Department of Commerce. By the first of July of this year more than 26,000,000 people were living in 366 zoned municipalities as against the less than 11,000,000 people in 48 cities and towns in September, 1921. The number of zoned municipalities thus increased more than seven times during the four year period.

PAROLE IN THE FEDERAL COURTS

By Andrew A. Bruce
Professor of Law, Northwestern University

BY an Act which was signed by the President of the United States on March 3, 1925, Congress authorized the United States District Judges, in proper cases, to suspend sentences and to place offenders upon probation "after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment."

Probation systems already exist in all of the American States, either under legislative sanction or as an assumed inherent power in the courts, and the act in question merely extends practice to the Federal Courts. Congressional sanction, however, seemed to be necessary on account of the decision in the case of ex parte United States, Petitioner, 242 United States 52, in which it was held that the District Courts had no inherent power to set aside a plain legislative command to try and sentence a criminal under a statute which defined the crime and fixed the punishment.[1] Strangely enough, however, the question was not decided, and perhaps was not argued, whether the courts could be given such power at all and whether the section of the Federal Constitution which provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment"[2] does not vest the authority solely in the President of the United States.

We believe that the act in question is constitutional but there is as yet no federal decision upon the subject, and though similar acts have been sustained by the courts of a number of the states, perhaps only one opinion has announced the real and unassailable reason.[3]

In the cases of People ex rel Forsyth v. Court of Sessions (N. York),[4] People ex rel Sullivan v. Flynn (N. York),[5] People v. Stickle (Mich.),[6] Richardson v. Commonwealth (Va.),[7] and in a special concurring opinion in In re Hart (North Dakota)[8] a fanciful distinction is made between the suspension of a sentence and a reprieve or pardon and the erroneous assumption is made that the power to suspend indefinitely was inherent in the courts of common law.[9] In the case of ex parte Giannine (Cal.)[10] the court cited no authority and contented itself with saying that the power conferred by the enactment did not in any manner interfere with the functions and duties of the chief executive. In Belden v. Hugo (Conn.)[11] the constitutional provision was not considered. In In re Hart (North Dakota)[12] the majority opinion takes refuge in the theory that it is the duty of the Supreme Court, if possible, so to construe a statute as to sustain its validity and it therefore interprets the clause "to suspend during good behavior" as if there had been added to it the words: "and but only for the purpose of affording to the accused the opportunity of appealing to the executive clemency." It concedes that at any time after the expiration of that reasonable period the convict may be rearrested, but evidently hopes and prays, either that he will obtain the clemency in the meantime or that, as long as his conduct is good, no one will seek to have him so arrested.

All of these opinions are unsatisfactory either because they ignore the real questions at issue or because of their erroneous assumption that the power to suspend a sentence was inherent in the courts of common law. The real and only solution of the problem lies in considering the suspension, when authorized by the legislature either in special statutes relating to each offense or in general statutes which relate to all, as a part of the sentence which the legislature itself has prescribed.[13]

Of course, it must be conceded that the legislature has the inherent power to define crimes and that it is the imposition of the penalty that turns a tort into a criminal act. It must be conceded that it is within the power of the legislature to impose any penalty it pleases as long as that penalty is not cruel or unusual. It can impose a prison sentence. It can impose a fine. It can impose a sentence of imprisonment which shall not begin to run until a number of weeks after the rendition of the judgment. It can impose a penalty which shall involve merely the giving of a peace bond. It can impose a penalty which shall be nothing more than a reprimand. It can provide that in certain instances no penalty at all shall be imposed. There is in fact no suspension of the sentence at all. The sentence is merely conditional and such a one as the legislature has prescribed. It is that the convicted person shall not be incarcerated or fined but shall be held under the surveillance of the court and of the law provided that he does not again offend. It is much like giving a peace bond. It has much in common with our statutes against habitual offenders, but includes the element of mercy. The prisoner is told to go and sin no more, but is reminded that if he does so sin his vacation will be over. The suspension, however, if suspension it be, must be entered as a part of the sentence. It cannot be allowed on a subsequent petition, for in that case it would be an exercise of the power to reprieve if not to pardon."[14]

1. American Bar Assoc. Journal, Vol. XI, p. 207.
2. Const of U. S., Sec. 2, Art. II.
3. Baker v. State, 702. Ct. App. 618, 158 S. W. 998.
4. 141 N. Y. 288, 36 N. E. 386.
5. 106 N. Y. Supp. 925.
6. 156 Mich. 557, 121 N. W. 497.
7. 109 S. E. 460.
8. 29 N. Dak. 38, 149 N. W. 568.
9. For a refutation of this doctrine see Ex parte United States Petitioner, 242 U. S. 52, Snodgrass v. Texas, 67 Tex. Ct. App. 615, 15 S. W. 162, Power to Suspend Criminal Sentence, 6 Minn. Law Rev. 363.
10. 18 Cal. App. 166, 132 Pac 831.
11. 88 Conn. 500, 91 Atl. 369.
12. 29 N. Dak. 38, 149 N. W. 568.
13. This is the position which is taken by the court in the case of Baker v. State, 70 Tex. Ct. App. 618, 158 S. W. 998. See Power to Suspend a Criminal Sentence, 6 Minn. Law Rev. 363.
14. State of Indiana v. Smith, 173 Ind. 388, 90 N. E. 607.

Where the Journal Is on Sale

A list of the book and periodical stores at which the Journal is on sale will be found on page 635 of this issue.

PROBLEMS OF PROFESSIONAL ETHICS

The Duty of the State to the Bar

By Henry Upson Sims
of the Birmingham, Ala., Bar

IN THE last four studies we have endeavored to establish, first, the duty of the lawyer to the State—to aid in bringing about justice above all other duties; secondly, to delimit the duty of the lawyer to his clients—to secure for them the best presentation of the rights claimed, subject, however, to the first duty; thirdly, the duty of the lawyer to the Bar, especially in the line of upholding its dignity and striving to obtain for it the public respect; and fourthly, the duty of the lawyer to the courts—to protect the courts against too much criticism, and to uphold public respect for the bench as an institution of social order.

There can be no doubt that to establish the Bar and to maintain it so that it may function efficiently and freely in these four directions, would be greatly to the public good; and that therefore the code of legal ethics, which is substantially based upon the practicability of those ideas, is in accord with the public interests.

But unfortunately, that fact is not appreciated by the American public.

Social conditions in the United States have always been based on notions of intense individualism. Our colonies were in the main, founded on protests against the social conditions of Europe; and American civilization still refuses to recognize social distinctions. America has always striven to develop its social orders on the theory of universal effort without privilege and the survival of the fittest.

On the other hand, as we saw in our two earliest studies on legal ethics, the conceptions of the fundamental duties of the bar were a development from the social conditions of early Europe, and the chief privileges accorded the bar in England—exclusive self-management and self-limitation, together with the dignities of high social recognition and honors conferred directly by the crown — were direct out-growths of social conditions in Europe.

Therefore, social conditions in America are essentially unsympathetic with the maintenance of the ideals and the code of ethics conceived for the bar.

In the fields of commerce and industry American social theories have worked out very well. From the early days the young mechanic and the would-be merchant, unhampered by the trade guilds and spurred by ambitious energy, sought to please the public and sought out their patrons with so great success that American commerce and invention have pushed forward American manufactures until they are unrivaled at home and unsurpassed abroad.

And if labor unions and trusts eventually developed to put a check to individual effort, their development has been rather an evidence of the successful survival of the fittest in the competitive struggle of the individual for success, than disproof of the early theory of unlimited individual opportunity as the basis of social development.

The lawyer, however, could not set out after business without breaking the rules of his profession; and without that privilege, unlimited competition has tended to keep him continually in the early stages of success. Of course, general recognition by his immediate neighbors that he did his work well may have brought a measure of success to one rather than to another whose ability or skill was indifferent; but by reason of the large number of lawyers who conduct correctly the business entrusted to them, it is largely a matter of chance that some good lawyers get business enough to enable them to live up to the standards of professional ethics, while others with the same ideals and often as good ability take causes which they would not uphold were they not uncertain of receiving business enough to insure a good living without so doing.

The first remedial measures that occurred to the professional mind was to establish agreed standards of fees. But that has many objections; the greatest of which is that, like the modern labor unions, it ignores differences in ability. And it also fails to bring the desired relief, as it does not in fact bring business. Nor does it take into consideration the fact that the insincere lawyer can easily break the agreement and keep his breach of faith secret for a long time, thereby inducing business from those whom it was primarily designed to help.

The next remedial measure was the organization of associations and correspondence agencies, often directed by laymen, to corral and distribute law business. But that leads directly to the solicitation of business and the resultant and almost unavoidable consequence of dividing fees with the associations which forward the business. So that the bar associations now are finding great difficulty in reconciling the functions of unobjectionable forwarding agencies with the ethical principle believed to be necessary to the maintenance of the high standards of practice outlined for the bar.

The truth is that the highest efficiency of the lawyer requires that he should not be concerned with the acquisition of business; and anything which impels him to consider the effect of his actions beyond the conscientious conduct of such business as he has, tends to weaken his moral fibre, and to lower his ideals of his profession.

Of course, there are a good many lawyers who receive a reasonable living by attending to the affairs of one client. American business has produced many corporations and individuals whose interests are large enough to require all the time of not merely one lawyer, but often of a corps of lawyers; and these lawyers, who generally have to worry very little about keeping their clients, can develop very high ideals of their profession. But from the concentration of their efforts in the interest of one client, it is easy for them to become so saturated with the equity of that client's aims and interests as to become biased and incapable of forming a just estimate of the antagonistic interests of others. They are hardly as well qualified to lead the

courts in the direction of strict justice as the lawyer who is employed by many clients with diverse interests. And it would be unfortunate if the judges had to be chosen to any great extent from lawyers who have thus spent many years upon one client's affairs exclusively.

Yet, as the conditions of practice now are, the highest success in the legal profession is to gain sufficient recognition for ability to be sought out and employed by one interest or one class of similar and non-antagonistic interests to advise on their legal relations or to conduct their litigation alone. And even this employment engages so few of the lawyers that throughout the country it is not infrequently asserted that the corporations secure the maximum of service for the minimum of outlay, so great is the desire of the members of the bar to enjoy the comparative certainty of a reasonable income. It is needless to consider, therefore, whether the possibility of that source of employment is sufficient to justify the continuance of the present plan of allowing any one who passes the entrance examinations to be admitted to the bar, and to rely upon the survival of those corporation lawyers alone as the fittest and as numerous enough to uphold the ideals and to maintain the highest standard of ethics desired for the profession. Moreover, it is the lawyer of the smaller clients, or rather the clients with the individual cases instead of continuous legal business, whose ideas of the ethics of his profession it is most important to society to elevate. He is the confidant of the widow and the impoverished and the defender of the rights of the orphan; and unless he works for abstract justice, rather than for his own advancement, American society will soon have little to recommend it, and the next generations will return to the feudal system of the Angevin kings, when as Pollock and Maitland tell us, many a yeoman was glad to surrender his lands and do homage to a great lord in order to receive them again as a tenant along with the protection of the lord's influence and power.

What then, should the State do to rectify the situation? Of course, there could not be a law to apportion the causes among the members of the bar; nor a law to limit directly the number of lawyers permitted to practice before each court. Nor would it be safe to allow the bar associations to exercise the authority supposed to be exercised by some of the trade unions, of determining arbitrarily from time to time how many shall be admitted to the bar.

But it would seem not unwise for the State to permit the setting up of barriers to discourage the entry into the profession of numbers of young men—and now of young women too,—who do not understand the situation within the bar, and who, because the bar is supposed to offer more independence of action and therefore better social position than the occupations immediately before them, are bending every effort to acquire the absolutely necessary learning which will permit them to pass the entrance examinations and get in.

The State should require, or better, should authorize the bar to require of the applicant for admission to practice, first, an academic degree, and then a reasonably long course of law study and an examination, and then a training period in a lawyer's office of one to three years' duration; after which, if a proper character, he should be permitted to practice.

Such measures would not be new. In France for many years before the war the would-be barrister was required to study in an office after emerging from the university, and in addition, was required to prove to the authorities that he had means sufficient to live upon during the period of his novitiate.

The state constitutions may limit the restrictive measures which can be applied. But whether it is constitutional to restrict the numbers of the bar for the ultimate public good, or whether restrictive measures must be so selected as to be supported as plans to elevate the type of lawyer admitted to practice, is unimportant to the end now in view; which is to reduce the size of the bar by lessening the accessions, leaving to time to do the rest.

Even the higher grade law schools could help the condition by discouraging students not definitely decided upon practicing law from taking courses directed primarily to fitting them for the actual practice, and by offering them instead more cultural courses on law and legal relations.

In short, there are too many lawyers at the American bar for the good of society, and the State owes the duty to the bar to devise methods of limiting their numbers; otherwise, it may soon become impracticable for the bar to maintain the present code of ethics and the highest ideals of the profession.

The law of demand and supply may reduce the number of lawyers in the end; but in the meanwhile. the ideals will have suffered, and the difficulty to restore them may lead to their being abandoned. As we saw in our previous studies, in maintaining the ethics of the profession lies the highest value of the profession; and economic difficulties are now portending the overthrow of our professional ethics.

Mrs. Kate Pier

Mrs. Kate Pier, a member of the Wisconsin bar since 1887, died at her country home in Fond du Lac June 23. She was the widow of a lawyer, Col. Colwert K. Pier, and the mother of his three daughters, Kate, Caroline and Harriet, all of whom practiced law in Fond du Lac and Milwaukee.

In the early seventies, on the advice of her mother and her husband, Mrs. Pier assumed the management of a considerable estate left by her father. This led to a particular interest in real estate law, in which she became an authority. She entered the law school of the University of Wisconsin with her eldest daughter and received the degree of LL.B. from that institution, from which the two younger daughters graduated later.

In 1891 Mrs. Pier was appointed a circuit court commissioner for Milwaukee county, the first instance in the United States of judicial powers being conferred on a woman. Mrs. Pier's work in the profession was that of an office consultant. She won and held the respect and confidence of the community for her clear thinking and her sound, conservative judgment and advice. She was a member of county, state and national bar associations. On the occasion of her funeral the entire Fond du Lac Bar Association attended in a body. She was a charter and honorary member of the Milwaukee Business and Professional Women's Club, a member of the National Women's Lawyer's Association, the founder and president of the Portia Club of Milwaukee, and a charter member and the first dean of the University of Wisconsin chapter of Kappa Beta Pi legal sorority.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

California

California Bar Association's Annual Meeting

The California State Bar Association met at Lake Tahoe on September 3, 4 and 5. The meeting was called to order by President George A. McNoble, of Stockton, who delivered his annual address, entitled "How the Bar May Further Aid the Courts in the Administration of Justice." At the first session the Association re-endorsed the self-governing bar bill unqualifiedly, and expressly disapproved of a proposal that had been made during the last session of the legislature, that the Board of Governors of the reorganized bar should be appointed by the Governor. Resolutions to this effect were adopted following the report of Joseph J. Webb of San Francisco, Chairman of the Committee on Organization of the Bar. After recounting the efforts of the Committee to promote understanding of the bill among the bar and people of the state prior to the meeting of the legislature, he sketched the activities of the Committee before that body, which had resulted in the practically unanimous enactment of the bill, to be followed unfortunately by Governor Richardson's veto. At the evening session Mr. Arthur M. Elles, of Los Angeles, delivered an address on "Character and Incidents of the Period of Transition from the Mexican to the American Rule in California."

Dean Orrin Kip McMurray, of the School of Jurisprudence of the University of California, delivered an address on "Seventy-five Years of California Jurisprudence" at the morning session on September 4. Then followed reports of Sections and discussion thereon. The meeting approved a suggestion presented in the report of the Section on Courts and Judicial Officers, that the increases in salaries for judges provided for by the statutes enacted in 1925 are inadequate and that no effort should be spared to secure further increases. It also approved the recommendation of the Judicial Section for an amendment to the Constitution providing for a Judicial Council and its recommendation in support of the Judicial Conference Bill. It reaffirmed previous action of the Association endorsing a higher standard of legal education for admission to the bar, and approved the recommendation of the Section on Legal Education that an examination be required of an applicant for admission to the Bar of the state who may have been admitted to practice law in the highest court of a sister state or of a foreign country, where the qualifications in such states shall not be substantially equivalent to those prescribed in the law of California. The recommendations of the Committee on Legal Aid that the Association assist in the development of legal aid throughout the state and that every bar association in the state be requested and encouraged to appoint a standing committee on legal aid, were approved. Various other matters submitted by the Sections were discussed.

J. W. S. Butler, of Sacramento, acted as toastmaster at the annual banquet and the speakers were Judge Bartlett of Reno, Mr. Haight of the Nevada Bar Association, Mrs. Oda Faulconer of Los Angeles and President George F. McNoble. The following officers were elected for the coming year: President, Charles A. Shurtleff, San Francisco; Vice-Presidents—Charles A. Beardsley, Oakland; Lewis H. Smith, Fresno; Thomas C. Ridgway, Los Angeles; Secretary, Thomas W. Robinson, Los Angeles; Treasurer, Delger Trowbridge, San Francisco; Executive Committee—Orrin J. Lowell, Auburn; Leonard Slosson, Los Angeles; Joseph J. Webb, San Francisco; W. G. Griffith, Santa Barbara; Fred E. Lindley, San Diego.

Kentucky

Annual Meeting of Kentucky Bar Association

At the annual meeting of the Kentucky State Bar Association, at Bowling Green, Kentucky, in July, 1925, various matters of interest were considered and the following action was taken:

Resolution providing that Circuit Judges and Judges of the Court of Appeals of Kentucky might retire on full pay upon reaching 70 years of age and after fifteen years of continuous service was referred to the Law Reform Committee.

The Committee on Legal Education and Admission to the Bar recommended that the Court of Appeals of Kentucky be asked to amend the rules for admission to the Bar so as to require candidates for admission to be graduates of a first class high school, and also to require a course of at least two years at some reputable Law School. The Association adopted a resolution to this effect.

After the presentation of an address by C. U. McElroy, of Bowling Green, on the subject, "The Perils of Paternalism and the Proposed 20th Amendment to the Federal Constitution," the Association adopted a resolution directing the officers of the Association to notify the Kentucky Legislature that it is the sense of the Association that if and when the proposed 20th amendment to the Federal Constitution is proposed to the Kentucky Legislature, same should be defeated.

The Association authorized the appointment of a Special Committee to devise means for improving and extending the work of the Association, with particular directions to consider the subject of Statutory Bar Organization. Harry B. Mackoy is chairman of the Committee appointed under that resolution.

The Association authorized the appointment of a Special Committee to aid in drafting legislation, which committee is to devise a plan for furnishing to the Legislature expert aid in drafting legislation and is to consider the subject of a general revision of the statutes and of the biennial revision plan in force in Wisconsin. Judge Hugh Riddell, of Irvine, Kentucky, retiring president, who discussed this subject in his address, is chairman of that committee.

The following addresses were delivered: "Contact With Life Through the Law," Hon. Homer Cummings, Stamford, Conn.; "The Transportation Act," Judge Robert V. Fletcher, Chicago, Ill.; "Some Great Lawyers of Kentucky," C. H. Bush, Hopkinsville, Ky.; "The Perils of Paternalism and the Proposed 20th Amendment to the Federal Constitution," C. U. McElroy, Bowling Green, Ky.; "First Impressions," Robert L. Porter, Hazard, Ky.; "The Kentucky-Tennessee Line," Senator Ben T. Davis, Hickman, Ky.

The officers elected for the ensuing year are as follows: John C. Doolan, President, Louisville; John Verser Conner, Secretary, Louisville; D. Collins Lee, Covington, Treasurer. Executive Committee: Clifford E. Smith, Ashland; Joseph S. Laurent, Louisville; Orie S. Ware, Covington; Thomas E. Sandidge, Owensboro; John L. Dorsey, Jr., Henderson; Hugh Riddell, Irvine.

Vice-Presidents: 1st district, W. A. Berry, Paducah; 2nd, Everett Penick, Elkton; 3rd, H. S. McElroy, Lebanon; 4th, James Garnett, Louisville; 5th, John D. Carroll, Frankfort; 6th, Matt Herold, Newport; 7th, O. T. Hinton, Pikeville.

J. Verser Conner, Secretary.

Minnesota

Minnesota Bar's Annual Meeting Deals With Important Matters

The annual meeting of the Minnesota State Bar Association was held at Rochester on July 21, 22 and 23. It was called to order by President Eaton. The address of welcome was delivered by Hon. Henry O. Christensen of Rochester, and the response was by Vice-President Howard P. Abbott of Duluth. Other addresses during the meeting were delivered by Dr. W. J. Mayo of Rochester; J. J. Fitzgerald, Registrar of Deeds of Ramsey County, on "Photostatic Methods of Recording Documents"; Hon. John F. Meighen of Albert Lea on "My Trip Around the World"; Hon. Aad J. Vinje, Chief Justice of the Supreme Court of Wisconsin, on "Present Day Problems in Jurisprudence."

The meeting approved a recommendation, contained in the report of the Committee on Legal Education and Admission to the Bar, that the Supreme Court adopt rules providing that the course of study in a night law school or an office shall consist of four years instead of three; that the high school education or its equivalent required as a qualification shall be acquired prior to entrance in a law school, except as to those who shall have matriculated in a law school prior to September 1,

1925; and that evidence that applicant has a high school education or its equivalent shall be furnished by diploma from a high school or other satisfactory preparatory school, or by a certificate from the University of Minnesota or other qualified college that the applicant has passed a satisfactory entrance examination. It also followed another recommendation of this Committee by adopting a resolution expressing the view that every applicant for admission to the Bar, except those qualified under the rules by reason of practice in other jurisdictions, should without exception be required to pass the Bar examination. This recommendation of the Committee was moved by the fact that the Minnesota legislature, at the 1925 session, had passed acts doing away with the requirement for an examination by the Board of Law Examiners, in the case of disabled veterans of the World War who have received vocational rehabilitation and training in the law, and in the case of veterans of the World War who were members or employees of the 1925 legislature.

The Legislative Committee reported that the Association bill providing for the filing of information by the County Attorney in any case where an indictment would lie, was recommended favorably for passage in the legislature but too late in the session to come to a vote; that the Association's bill on Bar Organization was recommended for passage by the House Judiciary Committee by a small majority, but a vote was not reached during the session, and in the Senate the bill was not reported out of the Committee, and that the bill to increase the salaries of District judges was not reported by the Committee either of the House or the Senate. The Legislative Committee urged the lawyers of the state to try and educate their senators and representatives as to the necessity of passing a salary increase bill. The Committee on Uniform Commercial Acts reported that Minnesota had adopted seven of the nine uniform commercial acts put out by the National Conference of Commissioners on Uniform State Laws prior to 1922. None of the uniform acts had been passed in Minnesota at the sessions during the past winter, but the legislature seemed favorably impressed with the many advantages of the Uniform Declaratory Judgments Act, and it was believed that another session would witness its adoption.

The Association adopted two recommendations of the report of the Committee on Uniform Procedure in the Federal Courts, presented by Chairman Shearer. First, approving Senate Bill 2061, empowering the Supreme Court of the United States to make and publish rules in common law actions; Senate Bill 2692, providing for the appointment of official stenographers in each district; and Senate Bill 2691, dealing with the loss of civil rights or citizenship for conviction of crime. Second, disapproving Senate Bill 624 and House Resolution 3260, restricting the powers of the judges of Federal Courts in the conduct of jury trials. The meeting also adopted a recommendation contained in the report of the Ethics Committee, presented by Chairman Oscar Hallam, that the laws of the state dealing with the trial of charges against attorneys be revised so as to make such cases triable before district courts instead of before the Supreme Court, as at present.

The report of the Committee on Organization of the State Bar, presented by Chairman Morris B. Mitchell of Minneapolis, was received and adopted. The Committee was continued and instructed, with the cooperation of the Committee on Local and State Bar Associations, to redraft the Constitution of the state association along the lines indicated in its report, and to present the matter for consideration at a special meeting of the Association. to be held some time during the present year. The meeting also adopted recommendations of the Committee on American Citizenship, that a careful study be made of the extent to which communism has become fixed in the state of Minnesota, with a view to counteracting it in every possible way; that, as far as finances permit, literature be printed and distributed by the State Bar Association, explaining the Federal Constitution and its relation to present-day society; and that particular attention be paid to teaching school children the fundamentals of our government.

A motion was adopted instructing the chairman to appoint a committee to consider the abolition of common law marriages in Minnesota and report to the Association. The Association also adopted a resolution going on record as recommending the photostatic method of recording documents in the office of the Registrar of Deeds of Ramsey County, and recommending its use to all the other registrars of deeds in the state. The following officers were elected for the coming year: President, Howard T. Abbott, Duluth; Vice-President, Frank E. Putnam, Blue Earth; Treasurer, William D. Graves, St. Paul; Secretary, Chester L. Caldwell, St. Paul; Board of Governors—1st Dist., Charles P. Hall, Red Wing; 2nd, Thomas C. Daggett, St. Paul; 3rd, Herbert Bierce, Winona; 4th, Paul J. Thompson, Minneapolis; 5th, E. H. Gipson, Faribault; 6th, J. L. Loben, St. James; 7th, George W. Frankberg, Fergus Falls; 8th, A. L. Young, Winthrop; 9th, James H. Hall, Marshall; 10th, John W. Hopp, Preston; 11th, Frank Crassweller, Duluth; 12th, A. W. Ewing, Madison; 13th, Charles Dealy, Pipestone; 14th, Julius J. Olson, Warren; 15th, Thayer C. Bailey, Bemidji; 16th, L. E. Jones, Breckenridge; 17th, R. H. McCune, Fairmont; 18th, Godfrey G. Goodwin, Cambridge; 19th, Reuben G. Thoreen, Stillwater.

New Mexico

New Mexico's Organized Bar Meets

The New Mexico State Bar Association on August 19 held its first meeting since the passage of the State Bar Reorganization Act by the legislature. Hon. J. M. Hervey of Albuquerque, president of the State Bar Commission and ex-officio president of the State Association, called the meeting to order. He spoke on the revival of the Bar Association of New Mexico and of its more active participation in the affairs of government and the general welfare of the state.

The Committee on Organization and Meetings made its report and this was approved and referred to the State Bar Commissioners, with the recommendation that it be approved by them. The Committee on Qualifications for Admissions to the Bar also made its report, which was discussed at length. The Committee's report stated that while it was in accord with the movement for higher standards for admission to the Bar, yet it felt that the immediate adoption of the high standard recommended by the American Bar Association would be too radical a step to take at the present time. It recommended, however, an initial move in that direction, and its suggestion, with slight modifications, was approved and referred to the Board of Commissioners with the recommendation that it be adopted. As modified, the proposal is that applicants for admission shall be required to have a high school education or the equivalent thereof, and either to have graduated from one of the law schools meeting the American Bar Association's standard or to have passed a period of three years' study in a law school or attorney's office, or the same period employed partly in each of these methods of study.

Hon. Clarence M. Botts, late of the Supreme Court, read a paper on "The Press and the Courts," which was received with applause. After this Senator E. C. Crampton read a paper on "A Comparison of English and American Procedure," which was greatly enjoyed. A resolution was passed expressing appreciation to the Hon. Herbert F. Raynolds, former Chief Justice, for his arduous labor in the preparation of a digest of the Supreme Court Reports of the State, and for his presentation of same with his compliments to the members of the bar of the state. Delegates to the American Bar Association annual meeting were appointed by the President with instruction to present a report of their participation and the action of the national bar association at the 1926 meeting of the State Bar Association.

Judge Wright made a report of the action of the legislative committee during the last session and suggested that members of the bar take into consideration the propriety of electing members of the legislature regardless of politics, with the aim that more members of the bar be sent there to help carry out the Association's program. The Bill requiring attorneys residing in other states to appear with some local associate counsel was discussed and referred to the committee on legislation. A resolution introduced by Mr. Pittman, to the effect that attorneys employed to represent persons accused of crime, should "in cases where the evidence is clear and the presumption great employ only such means of defense as will guarantee to the accused a fair trial and his constitutional rights," was referred to the State Bar Commission.

Following are the officers of the Association: President. J. M. Hervey, Albuquerque; First Vice-President, A. H. Hudspeth, Carrizozo; Second Vice-President, Carl H. Gilbert, Santa Fe; Secretary-Treasurer, Jose D. Sena, Santa Fe.